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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 73-144

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

UNION TANK CAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .....

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

UNION TANK CAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 7, 1973, and that Court's Orders, issued on April 23, 1973 and on April 30, 1973, denying rehearing with a suggestion for rehearing *en banc*.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 475 F. 2d 194. The Opinion of the Trial Judge in the United States District Court for the North-

ern District of Illinois, Eastern Division, is reported at 377 F. Supp. 83. The Arbitration Awards, and the Decision of the Regional Director for the National Labor Relations Board are contained in the Appendix hereto at A. 49, A. 43, and A. 30, respectively.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was rendered on March 7, 1973. (A. 3) A timely petition for rehearing *en banc* was denied on April 23, 1973, and corrected by Court Order of April 30, 1973. This petition for certiorari was filed within 90 days of the first Order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether an arbitration award rendered pursuant to a collective bargaining agreement, determining the contractual rights of the parties and awarding reimbursement for lost wages and benefits resulting from an Employer's voluntary breach of its contractual commitments, is enforceable under Section 301 of the Labor Management Reporting Act, where another part of the award affecting representation rights is not enforced?
2. Whether a National Labor Relations Board decision affecting representation rights nullifies an arbitration award determining and granting contractual rights and providing for reimbursement of lost wages and benefits resulting from an Employer's breach of the collective bargaining agreement?
3. Whether an Employer can unilaterally and voluntarily breach a collective bargaining agreement by creating a series of circumstances whereby the National Labor Relations Board prevents the continued application of that agreement and

thereby also deprive employees covered by that agreement of reimbursement benefits awarded pursuant to an arbitration award?

STATUTORY PROVISIONS INVOLVED.

UNITED STATES CODE, TITLE 29, § 185(a).

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

UNITED STATES CODE, TITLE 29, § 159(b).

Determination of bargaining unit by Board.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization

shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

STATEMENT OF THE CASE.

This petition seeks review of a decision of the Seventh Circuit Court of Appeals denying enforcement of an arbitration award providing monetary remedial relief, pursuant to a collective bargaining agreement, on the basis of an alleged conflict with the Decision of a Regional Director of the National Labor Relations Board in a representation case.

The essential facts of the case are relatively simple. Petitioner, Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW), a labor organization, had a collective bargaining agreement with the Respondent (Employer), Union Tank Car Company, covering employees employed at the Employer's Whiting, Indiana plant in the Calumet area of Indiana. The agreement contained a provision (Article II, Section 1) that if the plant or operation is moved to another location in the Calumet area, the agreement shall apply to such other location. (A. 54)

Shortly after the negotiations of this agreement, the Employer notified OCAW that the Whiting plant or operation would be moved to another location in the Calumet area (Plant No. 1), but that the agreement would not apply to such other location the Employer having granted recognition to another labor organization, the International Brotherhood of Boilermakers (Boilermakers). (A. 52)

OCAW filed a grievance under its contract contending, *inter alia*, that the Company was in violation of the contract provision described above; that benefits would be lost to employees covered by the OCAW contract; and that the employees would lose seniority rights upon such transfer. (A. 53)

The grievance was submitted to an arbitrator voluntarily selected by the parties. After hearing, the Arbitrator found as follows: Article II, Section 1 of the contract was the result of ten years of negotiations and had been incorporated into successive collective bargaining agreements during all that time. Its purpose was to protect employee wages and benefits upon a move of the plant or operation within a limited area in Indiana; a separate Memorandum of Agreement was negotiated for movement of the plant or operation outside of the Calumet area, with provision for negotiations of termination benefits culminating in the right of either party to strike or lockout. The sole reason for the contemplated move was the Employer's assertion that it was not economically feasible to maintain dual facilities in the Calumet area. As the result of the move, employees would lose benefits based on the reduced wage and fringe benefit structure of the Boilermakers' contract. The essence of the contractual provision was to protect employees, during the contract term, from the loss of such benefits and wages secured by the agreement. Although the plant move was not prohibited by contract, it was preconditioned on the Employer's ability to apply the contract upon such move. (A. 52; A. 66-A.70)

Parenthetically, a different result would have obtained had the Employer's notification of intent to move the plant occurred during contract negotiations, when employees were no longer bound by a traditional no-strike clause, and the Employer was not bound by the contractual commitment in Article II. Thus, here the only recourse of the Union and its members was through the grievance arbitration procedures of their contract.

Having decided the meaning and application of the contractual provision in the specific context of the case before him, and having determined that the contract required application of the OCAW agreement to the operations at the other plant—as a precondition for the plant removal, the Arbitrator next considered the question of appropriate remedy. However,

because, as the Arbitrator noted, the question of recognition rights at the new plant was pending before the National Labor Relations Board (NLRB), the Arbitrator rendered an award in two parts, as follows:

> "(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW agreement to the finishing operations performed in Plant No. 1.
>
> (b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violations of Article II, Section 1, as heretofore determined." (A. 48)

In essence the Award provides that although the Employer may be successful before the NLRB on the issue of recognition rights at the new plant, OCAW-represented employees would, nevertheless, not be deprived of a remedy for the Employer's contractual breach.

On March 10, 1971, the Employer filed a unit clarification petition with the National Labor Relations Board seeking a determination that the bargaining unit at its new plant was represented by the Boilermakers' Union. On April 28, 1971, the Regional Director for the NLRB issued his Decision and Order clarifying a unit, finding that the unit at Plant No. 1, the new plant, is clarified to include all production and maintenance employees who are represented by the Boilermakers. The Regional Director found that the Arbitrator's decision was not dispositive of the representation issue before the Board, and that the Arbitrator had declined to decide the unit question. As Regional Director Madden stated:

> "With respect to Arbitrator Platt's Award, the law is clear that before the Board will consider deferring to arbitration, the Arbitrator's Award must deal with the issue which is before the Board. Raytheon Company, 140 NLRB No.

883; the Horn & Hardart Company, 173 NLRB No. 164. Here, the issue is whether or not the Boilermakers' production and maintenance unit, which would include employees working in finishing operations, is the appropriate unit at Plant No. 1. Arbitrator Platt specifically declined to decide the unit question. . . ." (A. 40-41)

On April 6, 1971, OCAW filed suit in the United States District Court, Northern District of Illinois, to enforce part (b) Arbitrator Platt's award requiring the remedy of reimbursement for lost wages and benefits for OCAW-represented employees affected by the Company's violation of the OCAW agreement. Jurisdiction was based on Section 301 of the Labor Management Relation Act, 28 U. S. C. Section 185 (a). OCAW did not seek enforcement of that portion of the Platt award requiring application of the OCAW contract at the new plant, that issue having already been decided by the NLRB. Moreover, that portion of the Arbitrator's Award was *contingent* upon an NLRB decision, and was therefore unenforceable. The Employer and OCAW moved the trial court to dismiss and/or for summary judgment.

On September 20, 1971, United States District Court Judge James Parsons issued his Memorandum Opinion and Order denying OCAW's Motion for Summary Judgment and granting the Employer's Motion to Dismiss the Complaint and for Summary Judgment. Judge Parsons found that the Arbitrator deliberately worded his final Opinion and Award so as to make it into two distinct parts having only part (a) contingent upon subsequent National Labor Relations Board decision. However, the Court stated that "Irrespective of this Court's leanings", based upon three cases cited by the Court, namely *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261; *Smith Steelworkers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir. 1969); *Dock Loaders and Unloaders, Local 854* v. *W. L. Richeson Sons, Inc.*, 280 F. 2d 40, 280 F. Supp. 402 (Ed. La. 1968) established law provides that if there is a conflict between an arbitrator's Award and a later NLRB ruling the Arbitrator's

findings must give way before the superiority of the NLRB Decision. There is an apparent conflict in the Trial Judge's decision in that the Court first finds that the Arbitrator's Award is separable, with only one part contingent upon an award of the NLRB and on the other hand finds that, regardless of the Court's leanings, there is a conflict between the NLRB decision and the Arbitrator's Award. (A. 25-A. 27)

An appeal was subsequently filed with the United States Court of Appeals for the Seventh Circuit. That Court affirmed the decision of the Trial Court relying upon *dicta* contained in *Carey* v. *Westinghouse Corp.*, as a statement of national labor policy, and stating that:

> "Mr. Justice Douglas, writing for the majority, said: "Should the Board [NLRB] disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would of course, take precedence; and if the employer's action had been in accord with that ruling it would not be liable for damages under § 301." (A. 7-A. 8)

Again, the Court failed to deal with the fact that the Arbitrator purposely rendered his Award in two parts so as to remove any question of conflict with the NLRB or any question of the supremacy of the NLRB decision on the representation issue.

Chief Judge Swygert filed a Dissenting Opinion asserting that reliance of the majority on *Carey* and its progeny was misplaced. The Chief Judge found that there is no conflict with the decision of the NLRB. As Chief Judge Swygert stated:

> "I do not agree that these cases are dispositive of the instant appeal. The Company did not violate its contract with OCAW by refusing broadly to apply the work assignment provisions of the contract. It entirely avoided the OCAW contract by moving its finishing operations to a location where the NLRA—and, later, an NLRB decision —foreclosed adherence thereto in direct violation of the contract's removal clause. The distinction is important. Arbitral decisions on the issue of work assignment and

Labor Board unit clarification decisions go to the heart of an identical question: Who shall perform disputed work? An Arbitrator's decision that a Company has violated its contract by moving the site of a given operation is an entirely different matter. In short, the decision of Arbitrator Platt is wholly compatible with the unit clarification by the Board." (A. 16-A. 17)

OCAW filed a timely Petition for Rehearing *En Banc*. That tition was denied by the Court on April 23, 1973, and :n corrected by Order dated April 30, 1973, treating the tition as a Petition for Rehearing with a Suggestion for Re- aring *En Banc*, and noting Chief Judge Swygert's dissent. ۱. 1-A. 2)

HOW FEDERAL QUESTIONS WERE PRESENTED.

The federal questions were raised pursuant to Section 301 of e Labor Management Relations Act, 20 U. S. C. Section 5(a), for enforcement of an arbitration award providing re- bursement to employees for lost wages and benefits for an ıployer's violation of a collective bargaining agreement.

REASONS FOR GRANTING THE WRIT.

A National Labor Policy Was Inadvertently Stated Through Dictum in Carey v. Westinghouse, Which Has the Effect of Allowing an Employer to Unilaterally Breach His Contractual Commitments, and Then Was Misapplied to the Instant Case:

From certain unnecessary *dictum* in *Carey* v. *Westinghouse* ırp., 375 U. S. 261 (1964), there has sprung forth a small t developing body of labor law that seems to stand for the ɔposition that no arbitration award can remedy an employer's ılation of its contractual obligations. That *dictum* reads as lows:

> "Should the Board [NLRB] disagree with the arbiter, by ruling, for example, that the employees involved in a controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; *and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301.*" (Emphasis supplied) (at page 272)

There was, however, no question of damages before the United States Supreme Court in the *Carey* v. *Westinghouse Electric Corp.* case. Nor was the question of damages present before the New York Court of Appeals, 11 N. Y. Reports 2d 452, 184 N. E. 2d 298 (1962) from which court the *Carey* case was appealed. The only issue in *Carey* was whether the Court would enforce a contractual agreement to arbitrate a dispute which may involve matters within the jurisdiction of the National Labor Relations Board. This Court decided that it would order arbitration. The matter not having gone to arbitration, and the Arbitrator not having ruled on an appropriate remedy for a violation of the contractual agreement in that case, there was, of course, no issue as to the appropriateness of any remedy that would issue.

Although the *dictum* in *Carey* is neither relevant nor necessary for a decision in the instant case, as noted by Chief Judge Swygert, it nevertheless has given rise to a small body of federal labor law which appears to stand for the proposition that an employer can violate its contractual commitments with impunity. The practical effect of the *dictum* in *Carey*, though, again, not applicable to the instant case, but relied upon by the District Court and by the Court of Appeals, means that while unions are bound by traditional no-strike clauses in collective bargaining agreements for the duration of the agreement, the employer is not equally bound to his commitments.

From the *Carey* decision, has sprung forth two other decisions relying on *Carey* and used as a basis for denying enforcement of the arbitration award herein. Both cases, *Smith Steelworkers* v. *A. O. Smith Corp.* (7th Cir., 1969), 420 F. 2d 1

d *Dock Loaders, Local 854* v. *W. L. Richeson & Sons, Inc.* d. La. 1968), 280 F. Supp. 402, are similar factually to the *rey* case, but dissimilar from the instant case. Both *Smith* d *Dock Loaders* involve work assignment or unit clarification estions. In each the Court refused to order arbitration be- use the matter to be arbitrated i.e. the work assignment or presentation question, had already been decided by the LRB. In each case the employer was caught in a dilemma tween competing unions, each union contending that it repre- ted the employees or the work in question. In both *Smith* d *Dock Loaders* the dilemma was put to rest by the Labor ard. Neither of these cases represented the situation of a nt removal, i.e. a "voluntary dilemma" created by an em- oyer to avoid its contractual obligation.

While we are concerned with the *dictum* unfortunately in- ded in the *Carey* decision, and the several decisions that have rung forth therefrom, neither the *dictum* nor those other cisions involve elements present in this case. As stated by e Chief Judge, the instant case is one step removed from ose other cases cited in that:

> "free from statutory or administrative compulsion and motivated solely by thoughts of financial gain, the company placed itself in a position where it could not apply the OCAW contract. While the end result of the company's decision to remove has a surface similarity to the situations in *Smith* and *Dock Loaders*, the fact remains that the dilemma in which the company assertedly found itself prior to the NLRB decision was entirely of its own making and the product of its willful violation of the collective bargaining contract. In *Smith* and *Dock Loaders* the employer had no way of avoiding the eventual disputes with competing unions. If he favored one union, the other protested breach of contract and violation of the NLRA. This case does not present that situation. Had the company chosen to comply with the removal clause by staying at Whiting [the OCAW plant] or moving to another location where compliance was practicable, it is difficult to imagine that the Boilermakers or the Board would have been heard to complaint."

Succinctly stated, the instant case does not fall within the purview of those other cases cited in the majority opinion, because here the Employer was not caught in the legal dilemma posed by a conflict between the NLRB and its contractual obligation, but rather created a dilemma, voluntarily, wherein it could not give contractual validity to its commitment. Thus, the Employer knew that it could not both comply with its contractual obligation to apply the contract and move its plant to the new location, and, therefore, moved its plant and violated the contract.

Here the Employer's contractual obligation was to safeguard the employees' wages and benefits upon a short and reasonable move of the plant (3 miles) at which these employees were employed, during the contract term. This contractual commitment was violated by the Employer not because of any ruling or order or law under the National Labor Relations Act, but because, as the Arbitrator found, the Employer determined that it was economically feasible to do so, e.g. wages and benefits were lower at the other plant than under the OCAW contract. "Economic feasibility" constitutes the Employer's sole defense to the breach of its contractual commitment.

As a matter of simple equity the voluntary breach of contract requires an appropriate remedy, albeit one not in conflict with any law of the land. The Arbitrator found such a remedy by examining the essence of the protections offered under a contract and by awarding a "make whole" remedy to the adversely affected employees.

As the Chief Judge stated, quoting Professor Williston:

> "It is a principle of fundamental justice that if a promiser is himself the cause of the failure of performance either of the obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. 5 Williston, Contracts § 677 (3d ed. 1961)." (Opinion, at page 11)

It is a principle of fundamental justice that the promisees, the employees affected by this cause, not be taken advantage of by the failure of the Employer to perform its contractual obligation where the Employer itself is the cause of that failure of performance.

B. The Decision Below Raises Significant and Recurring Problems Concerning the Enforceability of Arbitration Provisions in Collective Bargaining Agreements:

The issue here posed is of extraordinary importance, not only because it is the result of *dictum* giving rise to a new body of federal substance labor law without consideration as to its application in a specific case, but also, because the body of labor law thus being developed is applied to a variety of situations having nothing to do with the facts of the case in which it originally arose.

The meaning and application of the *dictum* to a particular situation must be determined because of the serious impact it can have upon negotiations of collective bargaining agreements. If the *Carey dictum* is to be applied in such manner as to allow an employer to willfully evade contractual commitments through manipulation of a situation which it alone controls, and if the employer's breach of contract cannot be regulated through the normal grievance arbitration machinery of a collective bargaining agreement, obviously the employer's contractual commitment is meaningless. As applied in the instant case, the employer can literally wipe out the whole contract.

If such is the purpose of the *dictum*, the parties to a labor agreement should be able to evaluate whether the negotiations, and the deleterious affect on both parties resulting from the test of economic strength to arrive at an agreement, are worth the effort. If labor agreements are solely enforceable by the Employer, there is little purpose in negotiating such agreements. Similarly, if Court implied no-strike provisions are the *quid*

pro quo for enforceability of the Employer's commitments through arbitration, and the Employer's commitment is unenforceable, the no-strike clause becomes a manifestly unfair court enforced unilateral commitment. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers, International Union, AFL-CIO*, 370 U. S. 254 (1962).

C. The National Labor Relations Board Decision Is Not in Conflict with the Award of Arbitrator Platt:

The instant case represents a classic example of a collective bargaining agreement rendered meaningless by the actions of the Employer.

The Employer took advantage of an anticipated ruling from the National Labor Relations Board that the OCAW contract could not be applied at the new location, because recognition had already been given to another labor organization, by moving its Whiting operation in disregard of its contractual commitment not to do so unless the contract could also apply. An arbitrator could not repair the denial of representation rights, but could and did repair the denial of contractual benefits. Accordingly, the arbitrator awarded the make-whole remedy, here sought to be enforced. The Arbitrator's Award does not impinge upon the NLRB's decision nor upon the NLRB's area of major concern with representation rights at the new plant. Indeed, the Regional Director for the NLRB specifically found that the Arbitrator *declined* to deal with the representation issue before the NLRB.

Thus, this case does not represent a challenge to the jurisdiction or authority of the National Labor Relations Board in representation or unfair labor practice cases. *Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists, Local 1304* (C. A. Ca. 1965), 344 F. 2d 300, cert. den'd., 382 U. S. 826. It is solely directed to the right of an arbitrator to devise an appropriate remedy for a contractual breach,

which seemingly had been laid to rest by the United States Supreme Court in several of its landmark decisions. See *Textile Workers of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960); *United Steelworkers of America* v. *Warrior and Navigation Company*, 363 U. S. 574 (1960). Parenthetically, even the NLRB does not have the authority to determine the rights of parties under collective bargaining agreements except as incident to an unfair labor practice charge; the arbitrator's reimbursement award has not been and is not the subject of an unfair labor practice charge. *NLRB* v. *C. & C. Plywood Corp.*, 385 U. S. 421, 427 (1967) rehearing denied, 386 U. S. 939.

To *paraphrase* the apparent intent of Mr. Justice White in his Dissenting Opinion in *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351 (1971), 39 LW 4101, 4109, the *dictum* in *Carey* has the effect of emasculating the arbitration process:

> "In short, the Court today makes an unnecessary and ill-advised detour around the body of arbitration law developed by Congress and this Court. Its reasons for doing so, in my opinion, comport with neither the language of the statute [Section 301] nor considerations of sound labor . . . policy."

CONCLUSION.

It is respectfully urged that this Court reexamine and determine the applicability of the *dictum* in the *Carey* case to problems such as are presented here. A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Corrected.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1973

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*

Hon. WILBUR F. PELL, JR., *Circuit Judge*

LOCAL 7-210, OCAW, AFL-CIO,
Plaintiff-Appellant,

No. 71-1798 *vs.*

UNION TANK CAR COMPANY,
Defendant-Appellee.

On Petition for Rehearing *En Banc.*

Plaintiff-appellant filed on March 20, 1973 a petition for rehearing en banc. Defendant-appellee filed an answer to the petition for rehearing *en banc* on April 2, 1973. The panel decided to treat the petition for rehearing *en banc* as a petition for rehearing with a suggestion for a rehearing *en banc.*

On consideration of the plaintiff-appellant's petition for rehearing by the court *en banc* in the above entitled appeal, and no member of the panel and no judge in regular active service having requested a vote on the petition for rehearing *en banc,* and a majority of the panel having voted to deny the petition for rehearing,

It Is Ordered that plaintiff-appellant's petition for rehearing *en banc* be, and the same is hereby denied.

(Chief Judge Luther M. Swygert would grant the petition for rehearing.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 23, 1973

Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiff-Appellant,

No. 71-1798 *vs.*

UNION TANK CAR COMPANY,
Defendant-Appellee.

On Petition for Rehearing *En Banc.*

On consideration of plaintiff-appellant's petition for rehearing *en banc* in the above entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the petition for rehearing *en banc*,

It Is Ordered that the petition be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

September Term, 1972 — September Session, 1972

No. 71-1798

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiff-Appellant,

vs.

UNION TANK CAR COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-846

JAMES B. PARSONS,
Judge.

Argued November 3, 1972 — Decided March 7, 1973

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and PELL, *Circuit Judge*.

HASTINGS, *Senior Circuit Judge*. On April 6, 1971, pursuant to § 301 of the Labor Management Relations Act, as amended, Title 29, U. S. C. A. § 185, plaintiff-appellant, Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW), filed an action in the federal district court against defendant-appellee, Union Tank Car Company (Company). It sought thereby to enforce compliance with the provisions and award of a decision by Labor Arbitrator Harry Platt.

This action was the culmination of the tortuous course of a labor dispute between the parties. The administrative pro-

cedures included an initial and final decision by Arbitrator Platt, a succession of unfair labor practice charges, representation petitions and unit clarification petitions before the National Labor Relations Board and a decision by Impartial Umpire David Cole under the AFL-CIO Internal Disputes Plan.

For many years the Company had been engaged in the manufacture of railway tank cars for lease and sale and in the repair and maintenance of completed tank cars at plants located throughout the United States, including facilities involved here located at East Chicago and Whiting, Indiana.

The facility in East Chicago was located on Tod Avenue. Until the latter part of 1969, it was primarily used in the manufacture (fabrication) of tank car shells. Aside from some tank car finishing functions there, the usual procedure was to ship the tank car shells to its Whiting plant for finishing. In 1961, the Whiting facility had been engaged principally in the repair and maintenance of damaged tank cars.

In 1966, the Company acquired a vacant facility, known as Plant No. 1, in East Chicago, across the street from its Tod Avenue plant. It then began remodeling Plant No. 1 with the intention of building, for the first time, an integrated manufacturing facility where new tank cars could be completely manufactured in one place. At that time the Company claimed it had no intention of curtailing the finishing operations at Whiting but did plan to engage in finishing operations at Plant No. 1 when it was ready. In late 1969, because of financial reasons, such as market projections, general economic forecasts and orders, the Company decided, sometime after Plant No. 1 was completed, that it would not be feasible to maintain Whiting as a finishing operation. Accordingly, in early 1970, the major portion of the finishing operation was curtailed there and Whiting went back to being a repair and maintenance facility. By late 1970, finishing work at Whiting ceased.

In the meantime, fabrication work commenced at Plant No. 1 in 1968 and was timed with the phase-out of the Tod Avenue

lant. It was accomplished by the transfer of employees from Tod Avenue. By August 1970, peak employment at Plant No. 1 vas reached. This included 200 employees working in the inishing operation, some of whom had been transferred from Whiting.

Beginning in 1945, when the Tod Avenue plant in East Chicago was owned and operated by Graver Tank and Manufacuring Company, and continuing from 1957, when it was acquired by the Company, the production and maintenance employees in East Chicago were and still are represented by Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers). Likewise, at all times relevant here, the employees performing finishing and repair and maintenance work at Whiting were represented by OCAW. Boilermakers and OCAW were parties to separate collective bargaining agreements with the Company at all material times. All employees at Plant No. 1 were covered by the Boilermakers' contract. After notifying OCAW of its intention to curtail the Whiting operations, the Company and OCAW were unable to resolve their differences, OCAW taking the position that the Company was required to apply the OCAW agreement to the finishing operations at Plant No. 1. The above mentioned labor administrative procedures resulted.

The ruling of Arbitrator Platt sought to be enforced in the instant § 301 complaint was:

> "(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.
>
> "(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section 1 as heretofore determined."

Defendant Company filed a motion to dismiss the complaint and for summary judgment. Plaintiff OCAW filed a cross-motion for summary judgment. Subsequently, OCAW advised the district court, as it does now on this appeal, that it no longer seeks to enforce that part of the Platt award requiring the application of the OCAW contract at Plant No. 1 as set out in part (a), *supra*. OCAW no longer asserts any claim for representative status at Plant No. 1 or any bargaining right or the right to negotiate a new agreement with the Company. It merely seeks to enforce part (b) of the award requiring the reimbursement and "make whole" remedy for former OCAW-represented employees.

OCAW's action in not further asserting any right to apply the existing OCAW agreement to the finishing operations performed in Plant No. 1 is but a compelled recognition of the determination by the National Labor Relations Board on April 28, 1971, that the employees, including those previously employed at Whiting and now employed at Plant No. 1, were properly within the Boilermakers' unit and that the "appropriate unit of Plant No. 1 is a plantwide production and maintenance unit, including the finishing operations and that the employees in this unit are presently, and have been since June 1969, represented by the Boilermakers as their exclusive bargaining representative." In short, in making its ruling on April 28, 1971, the NLRB had the entire situation before it[1] and pre-empted the field and chose to determine OCAW's rights under the National Labor Relations Act.

In substance, OCAW contends that the two provisions in the Platt award are separable and that the contingency upon an NLRB determination in part (a) is limited to that section and does not cover the remedial directions in part (b). The Com-

1. The record shows that the impartial umpire, David Cole, under the AFL-CIO Internal Disputes Plan, had held a hearing and ruled that OCAW had violated its agreement with AFL-CIO by its attempts to interfere with the Boilermakers' established collective bargaining status "as to employees doing finishing or car completion work at Plant No. 1."

pany makes the opposite contention. Viewed as a common law breach of contract question, a persuasive argument could be made for OCAW's position. However, we are in agreement with the district court that this case must be decided within the context of the Labor Act. If so, the action taken by the NLRB cannot be restricted to the representation matter, but it must be said to embrace all other matters, such as working conditions, wages and the like which are implicit in the rights accorded the certified representative of the employees at the plant covered by the collective bargaining agreement there in force.

The Company did not apply the OCAW contract to Plant No. 1 because it could not legally do so, for such would have been an unfair labor practice. Having acted in accord with the NLRB decision, how may the Company be liable for damages for refusing to violate the law? There was no breach of contract because OCAW's contract was never in force at Plant No. 1.

On August 4, 1970, Arbitrator Platt specifically ruled: "The Company violated Article II, Section 1 of the Agreement [with OCAW] by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1." This, of course, is in direct conflict with the later NLRB ruling, and OCAW has now abandoned any claim under part (a) of the Platt award. The remedial direction in part (b) of the Platt award is "to reimburse and make whole all OCAW-represented employees" for losses "caused by the violation of Article II, Section 1 as heretofore determined." This, too, is in direct conflict with the later NLRB ruling and cannot be separated from the contingency in part (a). Since there were never any OCAW-represented employees at Plant No. 1, because all employees there were represented by Boilermakers, it necessarily follows that the Company could not be made to respond in damages for the breach of a contract never in force at Plant No. 1.

In defining the limits and scope of arbitration in the field of national labor policy in *Carey* v. *Westinghouse Corp.*, 375

U. S. 261 (1964), Mr. Justice Douglas, writing for the majority, said: "Should the Board [NLRB] disagree with the arbiter, by ruling, for example, that the employees involved in a controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." *Id.* at 272. The Court further noted that "[t]he superior authority of the Board may be invoked at any time," but continued to recognize "the therapy of arbitration." *Id. See NLRB* v. *Plasterers Local 79*, 404 U. S. 116, 136-137 (1971). *Cf. U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351 (1971).

A district court put some flesh on the bare bones of the Supreme Court's dicta in *Carey* in *Dock Loaders Local 854* v. *W. L. Richeson & Sons*, E. D. La., 280 F. Supp. 402, 404-405 (1968). There, two unions, Teamsters and Dock Loaders, were locked in a dispute as to which should perform certain unloading work. Dock Loaders, following a grievance, won an arbitration award granting it the work and sought to enforce it in the federal district court. Following threat of a strike by Teamsters, the NLRB, responding to an unfair labor practice charge by the employer, awarded the work to Teamsters. Dock Loaders then filed a § 301 suit against the employer to enforce its arbitration award. The employer moved to dismiss and for summary judgment. The court held [*Id.* at 404] that there "would seem to be no question that, as between a grievance committee award of disputed jobs to certain employees and a conflicting NLRB allocation of the same jobs to different employees, the latter takes 'precedence,' " citing *New Orleans Typographical Union No. 17* v. *NLRB*, 5 Cir., 368 F. 2d 755, 767 (1966). In *Dock Loaders*, the court held that the dicta in *Carey* command respect, and in view of such language it ruled that the Labor Board's decision awarding the disputed work to Teamsters barred the recovery of damages in the § 301 case under the arbitrator's award. *Cf. Ironworkers Local 395* v. *Lake County Council, Bhd. of Carpenters*, N. D. Ind., 347 F. Supp. 1377, 1380 (1972).

Finally, in *Smith Steel Workers* v. *A. O. Smith Corp.*, 7 Cir., 420 F. 2d 1 (1969), we were concerned with a case in which two unions claimed representation rights over certain disputed job classifications. The employer sought a unit clarification by the Labor Board to determine the dispute. The Labor Board awarded the representation rights to one union. Nevertheless, the losing union demanded arbitration, which the employer refused. The losing union then sought to have the federal district court compel arbitration. The employer filed unfair labor practice charges against the losing union, alleging the union's actions in continuing to seek representation of its workers violated the Labor Act. The Labor Board found a violation of § 8(b)(3) of the Act on the ground that it had held the losing union to be inappropriate in its unit clarification decision. It entered an appropriate cease and desist order.

The district court dismissed the complaint, holding (1) that it lacked jurisdiction to set aside the Board's action, and (2) that under § 301(a) of the Act it could not compel the employer to arbitrate the representation question which had already been determined by the Labor Board in its prior unit clarification order. In its memorandum opinion, reported at 285 F. Supp. 1011 (1968), relying on *Retail Clerks International Association* v. *Montgomery Ward & Co.*, 7 Cir., 316 F. 2d 754, 757 (1963), the district court said: "Plaintiff now seeks to enforce a contract which would require defendant Company to take action directly contrary to a Board determination. Neither the policy of the Labor Management Relations Act nor prior court decisions support plaintiff's position." 285 F. Supp. at 1016.

We affirmed the district court's order, and Circuit Judge Cummings, writing for our court, said:

> "The district court was also correct in refusing to compel arbitration of the unit representation issue after its determination by the Board. Arbitration provides an alternative means of resolving disputes over the appropriate representational unit, but it does not control the Board

in subsequent proceedings. Carey v. Westinghouse Electric Corp., 375 U. S. 261, 268-272, 84 S. Ct. 401, 11 L. E. 2d 320. In this case no arbiter's award existed to which the Board could defer. All the parties involved in the dispute joined in petitioning the Board for clarification of the certificates and the arbitration hearing was accordingly postponed. The Board was not bound to delay its consideration of the issue under these circumstances. The Board's 1967 determination of the appropriate units fully disposed of the question. It defined the lawful limits of coverage of the contract which the Union sought to have enforced under Section 301(a) of the Labor Management Relations Act (29 U. S. C. § 185(a)). As in Retail Clerks International Ass'n v. Montgomery Ward & Co., 316 F. 2d 754, 757 (7th Cir. 1963), the Board's order deprived the Union of any right to recognition as the representative of the laboratory technicians and experimental workers. See also McGuire v. Humble Oil & Refining Company, 355 F. 2d 352, 357-358 (2d Cir. 1966), certiorari denied, 384 U. S. 988, 86 S. Ct. 1889, 16 L. Ed. 2d 1004. The court could compel neither arbitration nor enforce any arbiter's award in conflict with the Board's order. National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 365, 60 S. Ct. 569, 84 L. Ed. 799." 420 F. 2d at 7.

Further, after recognizing that the duties imposed on employers and unions by the Labor Act are complementary and must be construed in harmony with one another, we found that the same is true of the bargaining responsibilities created by the Act. The employer was required to bargain only with the proper representative of the appropriate bargaining units, even though the employer had previously bound himself by contract to bargain with an inappropriate representative. *Id* at 8, citing appropriate cases.

Quoting further from *Smith*, *id.* at 9: "Moreover, the unit clarification procedure is designed to present an alternative to an unfair labor practice charges as a means for obtaining an official determination of the correct bargaining units." And, *id.* at 10: "In addition, the Board's unit clarification order pre-

ny recourse by the Union to arbitration or other grie-
rocedure. As a result of that order, no contractual
isted which could be arbitrated or settled by bargain-

nplete reading of *Smith*, and its recognition of *Carey*
ted cases, makes clear to us the relevance of the suprem-
trine, and that once the Board has acted, either before
the arbitrator's award, the Board's order overrides the
or's decision. *Smith* further makes it clear that con-
rights cannot exist separately and apart from the union's
represent the unit. *Id.* at 12-13.

ave carefully reviewed the various contentions made by
and find them unpersuasive in light of *Carey, Dock*
and *Smith, supra*, and *National Licorice Co.* v. *NLRB*,
S. 350, 365 (1940). We are in accord with the well
d memorandum opinion of the district court, 337 F.
83 (1971), and the final conclusion reached by Judge
, when he said:

"In view of these decisions, it would appear that the
v thus established is that where there is a conflict be-
een an arbiter's award and a later NLRB ruling, the
biter's findings must give way before the superiority of
NLRB decision. If the employer has acted in accord
th the NLRB decision, it is not liable for damages." *Id.*
87-88.

he foregoing reasons, we affirm the action of the district
n denying the monetary remedial relief sought by the
. The judgment denying plaintiff OCAW's motion for
y judgment and granting defendant Company's motion
iss the complaint and for summary judgment is affirmed.

AFFIRMED.

SWYGERT, *Chief Judge*. I respectfully dissent. In support of affirmance, the majority asserts (1) that the facts of the case display no breach of contract by the company and (2) that the damage award of arbitrator Platt is in conflict with a unit clarification ruling by the Labor Board, thereby unenforceable on the authority of *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964). *Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir., 1969), and *Dock Loaders and Unloaders Local Union No. 854* v. *W. L. Richeson & Sons, Inc.*, 280 F. Supp. 402 (E. D. La., 1968).[1] With deference to the view held by my Brothers, I believe their reliance on *Carey* and its progeny is misplaced; if the arbitrator erred in finding a violation of contract, his award must fall for that reason and not because the award conflicts with a Board ruling. Moreover, if the arbitrator did not err, I cannot agree that his award is in conflict with a decision of the Labor Board.

Article II, Section I of the 1969 OCAW agreement reads:

> This agreement shall apply only to the operations of the Company at its Whiting, Indiana plant; provided, however, if such plant or operation is moved to another location in the Calumet area, this agreement shall also apply to such other location.

The history of bargaining between the company and OCAW from 1959 reveals that this removal provision and analogous predecessors were insisted upon by OCAW to assuage its concern that the company would relocate operations performed by OCAW members at the Whiting plant despite representations by the company that it had every intention of continuing the Whiting operations. As it turned out, the fears of the Union proved justified; only a few months subsequent to consummation of the 1969 agreement, the company informed OCAW that it was terminating the finishing operation at Whiting and reestablishing it at East Chicago, where the company had already extended recognition to the Boilermakers.

1. *See also Iron Workers, Local 395* v. *Carpenters*, No. 71 H 242 (N. D. Ind., Aug. 23, 1972), a case very close on its facts to *Dock Loaders*.

Negotiations ensued. OCAW took the position that the company was bound by the removal provision to apply the 1969 agreement to finishing operations at East Chicago. The company's response was to dispute the Union's interpretation of the contract and to argue that it could not lawfully recognize OCAW or apply the OCAW contract at East Chicago inasmuch as it had already extended representation recognition to the Boilermakers. The company persisted in the latter position throughout the course of litigation on the matter, and, on March 10, 1971, invoked the Board's representation processes by filing a unit clarification petition requesting that the Boilermakers' bargaining unit at East Chicago be clarified to specifically include the employees working in the finishing operation at that location.

Thus it is fair to say that the company, both at the time of and subsequent to its decision to relocate the Whiting finishing operation, had no intention of applying the OCAW contract at East Chicago, and, indeed, was convinced that to do so would violate its legal obligation to the Boilermakers as the exclusive bargaining representative for East Chicago employees.

II

The majority's holding that no contract violation occurred is summed up by the following paragraph of Judge Hastings' opinion:

> The Company did not apply the OCAW contract to Plant No. 1 because it could not legally do so, for such would have been an unfair labor practice. Having acted in accord with the NLRB decision, how may the Company be liable for damages for refusing to violate the law? There was no breach of contract because OCAW's contract was never in force at Plant No. 1.

From this I discern two separate positions.[2] The first is that the

2. A clarifying interpretation is needed for the statement that the company "acted in accord with the NLRB decision." There was no such decision in existence when the company chose to move the fin-

company was excused from compliance with the removal clause of the OCAW contract because of impossibility of performance; the second is that the company could not have breached the contract because it "was never in force at Plant No. 1 [East Chicago]."

While the quoted excerpt is a correct statement of fact, it fails as a premise to support its conclusion. That the contract sued upon was in force at Whiting is beyond dispute; the issue before us is whether the contract was violated at that location, not at East Chicago.

In resolving this issue a cardinal principle of contract law must be kept in mind. Professor Williston states it as follows:

> It is a principle of fundamental justice that if a promiser is himself the cause of the failure of performance either of the obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. 5 Williston, Contracts § 677 (3d ed. 1961).

Professor Corbin is of like mind:

> Whatever be the meaning given to the term impossibility, whether it be objective or subjective, and even though it be used to include varying degrees of difficulty and expense, the supervening situation that is so described does not excuse a promisor from his contractual duty if he himself wilfully brought it about, or if he could have foreseen and avoided it by the exercise of reasonable diligence and efficiency. In such a case, the promised performance was not impossible in any sense, either at the time the contract was made or for some time thereafter. 6 Corbin, Contracts § 1329 (1962).

To put it another way, and with specific reference to the agreement at issue, the requirement of the removal clause that the

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ishing operation from Whiting. The company relied solely on the NLRA in refusing to apply the OCAW contract at East Chicago. Furthermore, neither the NLRA nor the eventual unit clarification ruling by the Board ordered the company to move its finishing operation; each dictated only that operations at East Chicago were solely within the jurisdiction of the Boilermakers.

CAW agreement be applied at any new site of operation em-
dies a prohibitory mandate that the company undertake no
ove which would foreclose application of the contract. And
e facts leave no room for dispute that the company found it
possible to obey the removal clause because it chose to move
e Whiting operation to a plant where exclusive representation
d already been granted to another union. The real issue, then,
whether the company exercised "a reasonable degree of effort
d diligence" in attempting to comply with the removal clause.
Corbin, Contracts § 1329 (1962).

The arbitrator found that the move from Whiting was moti-
ted solely by economic considerations. The company admits
is: "In late 1969 . . . serious financial considerations such as
arket projections, general economic forecasts and orders,
used the Company to reconsider [its] plans to maintain dual
cilities." Def. Brief at 5. Generally speaking, however,
anged economic circumstances do not validate a defense of
npossibility. This is not a case like *United Auto Workers* v.
amilton Beach Mfg. Co., 40 Wis. 2d 270, 162 N. W. 2d 16
1968), *In re Curtiss-Wright Corp. and Office Employees' In-*
rnational Union, Local 279, 43 Lab. Arb. 5 (1964), or *In re*
afeway Stores, Inc. and Retail Clerks International Union,
ocal No. 648, 42 Lab. Arb. 353 (1964), where the union
ontract contained no express provision dealing with plant re-
oval, and legitimate business motives were found to justify a
ove of operations. *See also Shoe Workers* v. *Brooks Mfg. Co.*,
83 F. Supp. 568 (E. D. Pa., 1960). This, instead, is a case
here plant removal was barred except upon the condition that
ne contract be applied at any new site of operation. This pro-
ision was not complied with. Absent extreme economic hard-
ip, *cf. In re Curtiss-Wright Corp. and Office Employees' Inter-*
ational Union, Local 279, 43 Lab. Arb. 5 (1964)—which the
ompany certainly has failed to establish—no excuse lies for its
reach of the removal clause. *See In re Jack Meilman and*
lmalgamated Clothing Workers of America, 34 Lab. Arb. 771

(1960), *In re Centra Leather Goods Corp. and Pocketbook Workers Union of New York*, 25 Lab. Arb. 805 (1956).[3]

III

Smith Steel Workers v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir., 1969), holds that a unit clarification decision by the Labor Board provides an absolute defense to employer liability for violation of contract provisions respecting work assignments when work is assigned by the employer in conformity with the Board's ruling. *Dock Loaders and Unloaders Local Union No. 854, W. L. Richeson & Sons, Inc.*, 280 F. Supp. 402 (E. D. La., 1968), adds the corollary that employer violations of work assignment contract provisions are wiped out if his actions prove to be in conformity with national labor policy as interpreted by the Labor Board in a subsequent unit clarification ruling.

I do not agree with the majority that these cases are dispositive of the instant appeal. The company did not violate its contract with OCAW by refusing broadly to apply the work assignment provisions of the contract. It entirely avoided the OCAW contract by moving its finishing operation to a location where the NLRA—and, later, an NLRB decision—foreclosed adherence thereto, in direct violation of the contract's removal clause. The distinction is important. Arbitral decisions on the issue of work assignment and Labor Board unit clarification decisions go to the heart of an identical question: Who shall perform disputed work? An arbitrator's decision that a company has violated its contract by moving the site of a given operation is an

3. The company would avoid this analysis by noting that arbitrator Platt *"did not hold that the Company violated the OCAW agreement by moving the work from Whiting* or that it was required to build a new plant separate and apart from Plant No. 1." Df. Brief at 33 (emhasis supplied). This may be true if the arbitrator's opinion is read narrowly, but it is hardly a compelling reason to reverse the arbitrator when his ultimate determination of a contract violation is unimpeachable. It is also significant that the company does not argue that OCAW failed to raise the above contentions before the arbitrator.

entirely different matter. In short, the decision by arbitrator Platt is wholly compatible with the unit clarification by the Board.

Had the relocation of operations at issue been required by the Act or by a Board decision, I would agree that *Smith* and *Dock Loaders* fully dispose of OCAW's sought damage award. This case, however, is one step removed; free from statutory or administrative compulsion and motivated solely by thoughts of financial gain, the company placed itself in a position where it could not apply the OCAW contract. While the end result of the company's decision to remove has a surface similarity to the situations in *Smith* and *Dock Loaders*, the fact remains that the dilemma in which the company assertedly found itself prior to the NLRB decision was entirely of its own making and the product of its willful violation of the collective bargaining contract. In *Smith* and *Dock Loaders* the employer had no way of avoiding the eventual disputes with competing unions. If he favored one union, the other protested breach of contract and violation of the NLRA. This case does not present that situation. Had the company chosen to comply with the removal clause by staying at Whiting or moving to another location where compliance was practicable, it is difficult to imagine that the Boilermakers or the Board would have been heard to complain.

Although I agree that not all remedies may be open to an arbitrator when a violation of contract is found, the fact that one remedy may be unavailable hardly justifies a denial of liability. This, in essence, is what the company is arguing here;[4] since, it

4. Assume that arbitrator Platt required the company to reestablish finishing operations at Whiting, rather than awarding the contingent injunctive relief that he did. See *In re Centra Leather Goods Corp. and Pocketbook Workers Union of New York*, 25 Lab. Arb. 805 (1956). In that event I doubt that the company would argue that *Smith* and *Dock Loaders* require vacation of the damage award, since company compliance with the arbitral mandate would eliminate any possibility that company action would conflict with the Board clarification of the East Chicago unit. This case differs only in that the injunctive relief sought by OCAW did raise such a conflict. But

asserts an injunctive remedy requiring application of the OCAW contract at East Chicago is precluded by the Board unit clarification, damages on the same contract would be inconsistent. This is not correct. The company violated the OCAW contract in a manner which—unlike a work assignment violation—is not protected by the Board clarification decision. That the Board decision precludes injunctive relief for that violation is no reason to withhold all relief.

I would therefore reverse the decision of the trial court and remand the cause for a determination of damages to OCAW.

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it bears repeating that the injunctive remedy is not now at issue; as the arbitrator himself recognized, that remedy was necessarily "contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA."

UNITED STATES DISTRICT COURT
N. D. Illinois, E. D.
September 20, 1971

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiff,
vs.
UNION TANK CAR COMPANY,
Defendant.

No. 71 C 846.

MEMORANDUM OPINION AND ORDER

PARSONS, *District Judge.*

This is an action by Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW) against Union Tank Car Company (Company) to enforce the damages portion of a labor arbitration decision. Jurisdiction is based on Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185. Both parties moved the Court to dismiss and/or for summary judgment. A brief reiteration of the facts as found by the arbiter is necessary for a full understanding of the case.

In addition to the Company's many other phases of business, it is also engaged in the manufacture of railway tank cars and in repair and maintenance of completed tank cars in East Chicago and Whiting, Indiana. The tank car shells were built in the Company's Graver Plant in East Chicago and then shipped to its Whiting Plant for the final finishing work. OCAW has represented the employees at the Whiting Plant since 1959, and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 374 (Boilermakers) has represented the employees at Graver Plant in East Chicago

since 1945. Both East Chicago and Whiting are in the Calumet area of Indiana.

In 1966, the Company purchased a vacated plant about three miles away from its Whiting Plant and across the street from its Graver Plant in East Chicago. The plant, since remodelled and known as Plant No. 1, was designed and built as an integrated tank car manufacturing plant with the object of using it as an additional manufacturing facility in the Calumet area. In late 1966, the Company received a special order for foam insulated tank cars, which, because of time schedules, it decided to have built and finished in Plant No. 1. Upon learning that Boilermakers were doing the finishing work, OCAW protested and filed a grievance pursuant to its collective bargaining agreement charging the Company with a violation of Article II, Section 1, of its agreement. Said agreement states:

> Article II
>
> Recognition; Union Security; Checkoff
>
> Section 1. This Agreement shall apply only to the operations of the Company at its Whiting, Indiana plant; provided, however, if such plant or operation is moved to another location in the Calumet area, this Agreement shall also apply to such other location.

In the grievance discussions which followed, the Company declared that the protested job was only a temporary one and that the employees assigned on it would return to the Graver Plant when it was finished.

On March 31, 1968, the Company and the Boilermakers negotiated a successor agreement to replace the one which expired on that date. In said agreement, the Boilermakers recognition as bargaining agent was extended to Plant No. 1. The arbiter was of the opinion that when the Boilermakers recognition was extended to Plant No. 1 "there was no thought in anyone's mind that the Whiting finishing operation would be relocated there. * * * It is much more realistic to suppose that

both the Company and the Boilermakers negotiators understood the extension of recognition to cover only the fabricating work that was 'presently' being performed at the Graver Plant and not the finishing operation which was being performed at Whiting."

Said agreement states in part:

Article I

Recognition and Relationship

Section 1. Recognition and Bargaining Unit. The Company recognizes the Brotherhood as the sole collective bargaining agent for wages, hours and working conditions representing the following appropriate unit, namely, all production and maintenance employees at the Company's plant at 151st and Railroad Ave., East Chicago, Indiana [Plant No. 1's location] * * *.

The new Company-Boilermakers agreement effective April 1, 1971, adds some weight to the arbiter's opinion. It states in part:

Article I

Recognition and Relationship

Section 1. Recognition and Bargaining Unit. The Company recognizes the Brotherhood as the sole collective bargaining agent for wages, hours and working conditions representing the following appropriate unit, namely, all production and maintenance employees at the Company's plant at 151st and Railroad Avenue, East Chicago, Indiana, including such employees working in the finishing operations * * *.

On February 23, 1969, the Company and OCAW renewed their agreement. During the course of the negotiations OCAW was presented with a copy of the 1968 Boilermakers agreement. OCAW persistently maintained during those negotiations that irrespective of whether or not another union represented the fabricating operation employees at the new plant, if all or a portion of the finishing operations were moved from Whiting to

another plant in the Calumet area, the Company would be obligated under Article II, Section 1, to apply its agreement to those operations. The Company continuously represented that it had every intention of continuing the Whiting finishing operations. Allegedly, it also agreed that neither union's rights would be affected by operations at the new plant, and that both unions would be consulted before action was taken to give rights to either one.

A few months later, the Company informed OCAW that it was terminating the Whiting finished operation and establishing it at Plant No. 1. Numerous Company-OCAW discussions followed and finally, failing to resolve their differences, OCAW filed a grievance pursuant to their collective bargaining agreement, charging the Company with a violation of the 1969 OCAW agreement and requesting that the agreement be applied in its entirety to Plant No. 1.

It is to be noted that the finishing operation at Plant No. 1 is (1) plainly identifiable; (2) performed exactly as it was at Whiting; (3) performed largely in areas separate from the fabricating operation; and (4) performed under separate supervision.

After findings and conclusions of fact, the arbiter, selected by both parties, found that the Company had violated Article II, Section 1, of the OCAW agreement by failing to have said agreement follow and apply to the finishing operation employees when they were moved from the Whiting Plant to Plant No. 1.

In his first opinion and award, rendered on August 4, 1970, the arbiter remanded to the parties for negotiation and settlement the question of the nature and extent of relief to be granted, retaining jurisdiction to finally decide the remedy question if the parties were unable to do so within a reasonable period of time. They failed to do so and, on November 6, 1970, he rendered the second and final following award:

> "(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the

existing OCAW agreement to the finishing operations performed in Plant No. 1.

"(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section I as heretofore determined."

During the interim of the initial and final awards while the Company and OCAW were negotiating in compliance therewith, the Boilermakers filed charges with the National Labor Relations Board (NLRB) alleging violations by the Company of §§ 8(a)(1), (2) and (5) and demanding that the Company cease negotiating with OCAW since the disputed employees were deemed covered by the Boilermakers contract. While these Boilermakers charges were pending before the Regional Director of the Thirteenth Region of the NLRB, OCAW, in mid-October, filed two petitions: One requesting a representation election among the employees working in the Plant No. 1 finishing operations and the other requesting a unit clarification of its Whiting bargaining unit to include the Plant No. 1 finishing operations. Both petitions later were withdrawn—only to be refiled in late February and again withdrawn.

On November 4, 1970, the Thirteenth Regional Director, responding to the Boilermakers' charges, issued a complaint alleging, *inter alia*, "that the Boilermakers were the collective bargaining representative of the employees at Plant No. 1, including those doing finishing work, and that by bargaining with OCAW in accordance with the Platt arbitration award (the arbiter's first award), over such employees doing finishing work, the Company violated §§ 8(a)(1), (2) and (5) of the National Labor Relations Act." (NLRA).

The arbiter was aware of these events when he rendered his final award two days later, and he also was aware that the Company planned to file a unit clarification petition.

On April 28, 1971, the Thirteenth Region of the NLRB responding to the Company's unit clarification petition request-

ing that the Boilermakers bargaining unit at Plant No. 1 be clarified to specifically include the finishing operation employees, rendered a decision holding that the employees, including those previously employed at Whiting and now employed at Plant No. 1, were properly within the Boilermakers unit and that the "appropriate unit of Plant No. 1 is a plant-wide production and maintenance unit, including the finishing operations and that the employees in this unit are presently, and have been since June 1969, represented by the Boilermakers as their exclusive bargaining representative."

Prior to the Company's unit clarification petition, a hearing was held on March 17, 1971, under the AFL-CIO Internal Disputes Plan, before arbiter D. Cole. That hearing was held pursuant to charges, later withdrawn by OCAW, against the Boilermakers for violation of the AFL-CIO "no raiding" agreement and counter-charges of the Boilermakers against OCAW based on similar allegations. On March 24, 1971, arbiter Cole ruled that OCAW had violated this agreement by its filing of representation petitions for the employees doing finishing work at Plant No. 1 represented by the Boilermakers.

The record shows that the NLRB complaint, the Cole ruling, and the April 28, 1971, NLRB ruling all discussed extensively OCAW's factual situation.

[1] OCAW does not now assert a claim for representative status at Plant No. 1, nor does it assert that it has any bargaining right, or the right to negotiate a new agreement with the Company. Neither does it seek to enforce that portion of the arbiter's final award requiring the application of the OCAW contract at Plant No. 1. It merely seeks to enforce part (b) of the award requiring the remedy of reimbursement for lost wages and benefits for former OCAW represented employeees.

At the outset, the Company contends that the award is not separable and that both Sections (a) and (b) of the award were contingent upon a later NLRB decision. The Company argues that since the award required it to apply the OCAW

ract only if legally permissible, and to pay damages for the od during which it legally could apply said contract to it No. 1 but did not do so, it is not liable for damages, hav- acted in accord with the NLRB ruling that the proper exclu- bargaining representative with whom it must negotiate is the ermakers. The thrust of the Company's position is that e it could not be compelled to apply the OCAW contract to it No. 1, because to do so would be illegal and violative of NLRB ruling, it cannot now be compelled to pay damages refusing to commit an unfair practice act.

The Court agrees with OCAW that the arbiter, aware of both surrounding events and of a possible future NLRB decision arding the representative status of OCAW, deliberately ded his final opinion and award so as to make it into two inct parts, having only part (a) contingent upon a sub- uent NLRB decision. The arbiter was of the opinion that legal strait-jacket which the Company later might find lf in was a result of its voluntary breach of contract by ex- ding Boilermaker recognition to Plant No. 1 before it was npleted and before any substantial operations were per- med there. As OCAW contended before him "[h]ad the mpany acted in good faith it could readily have granted ognition (for each Union) at Plant No. 1 dependent on the ure of the operation to be performed at that Plant."

rrespective of this Court's leanings, the decision of the United tes Supreme Court in Carey v. Westinghouse Electric Corp., 5 U. S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320 (1964); The enth Circuit in Smith Steel Workers v. A. O. Smith Corp., 9 F. 2d 1 (7th Cir. 1969); and the Eastern District of Lou- na in Dock Loaders & Unloaders, Local 854 v. W. L. Riche- & Sons, Inc., 280 F. Supp. 402 (E. D. La. 1968) appear clusive upon the question presented.

n *Carey*, the Supreme Court was faced with an action by union to compel Westinghouse to arbitrate a grievance ging that employees represented by a second union were

performing work belonging to the first union. When Westinghouse refused to arbitrate, the complaining union sought a court order compelling arbitration. The New York courts refused to grant the order. The Supreme Court reversed them. In discussing the effect of a conflict between an arbiter's award and a later NLRB decision, the Supreme Court stated in *Carey*, 375 U. S. at 272, 84 S. Ct. at 409, that:

> "Should the Board disagree with the arbiter, by ruling, for example that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301."

As noted in *Dock Loaders & Unloaders, Local 854, supra*, at 405, "[t]he quoted language, of course, is dicta for the specific issue before the Court in *Carey* was only whether arbitration could be compelled. However, in the absence of authority to the contrary, or of persuasive reasons for reaching the opposite result, the language of the Supreme Court commands respect."

In *Smith*, two unions claimed representation rights over certain disputed job classifications. The NLRB responding to a unit clarification petition filed by the company involved awarded representation rights to one of the unions. Despite the NLRB decision, the losing union demanded arbitration, which the company refused. The union then went into Federal District Court to compel arbitration. The District Court dismissed the complaint and was affirmed by the Seventh Circuit. In discussing the supremacy of the NLRB and the negation of a conflicting arbiter's award, the Seventh Circuit stated that "[a]rbitration provides an alternative means of resolving disputes over the appropriate representational unit, but it does not control the Board in subsequent proceedings. Carey v. Westinghouse Electric Corp., 375 U. S. 261, 268-272, 84 S. Ct. 401, 11 L. Ed. 2d 320. * * * The court could compel neither arbitration nor enforce any arbiter's award in conflict with the Board's order.

National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 365, 60 S. Ct. 569, 84 L. Ed. 799."

In *Dock Loaders,* the Dock Loaders filed a grievance with a grievance committee alleging that the employer had reached its collective bargaining agreement by assigning certain disputed jobs to members of the Teamsters Union. The Dock Loaders won the arbitration award and sought to enforce it in the Federal District Court. During the interim, the NLRB, responding to an unfair labor practice charge filed by the Teamsters, awarded the disputed work to them. After considering the aforementioned dicta in *Carey,* the court was of the opinion that the NLRB ruling awarding the disputed work to Teamster-represented employees barred the Dock Loaders' award of damages accruing prior to the NLRB decision despite the grievance committee award requiring such damages. Dock Loaders & Unloaders, Local 854 v. W. L. Richeson & Sons, Inc., 280 F. Supp. 402 (E. D. La. 1968).

[2] In view of these decisions, it would appear that the law thus established is that where there is a conflict between an arbiter's award and a later NLRB ruling, the arbiter's findings must give way before the superiority of the NLRB decision. If the employer has acted in accord with the NLRB decision, it is not liable for damages.

Accordingly, it hereby is adjudged, ordered and decreed that plaintiff's motion for summary judgment is denied and defendant's motion to dismiss the complaint and for summary judgment is granted.

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Thirteenth Region

UNION TANK CAR COMPANY *Employer-Petitioner* and LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS *Union*	Case No. 13-UC-50

AMENDMENT TO DECISION AND ORDER CLARIFYING A UNIT

On April 28, 1971, a "Decision and Order Clarifying a Unit" issued in the above-captioned case. The Decision is hereby amended as follows:

(1) On page 5, "9", referring to footnote "9", should appear after the word "finishing." on line 12.

(2) On page 6, the second quotation from Arbitrator Platt's Award is amended to read as follows:

> Accordingly, in this case, I must decline to decide the legal questions raised. It need hardly be added that in doing so those questions (but not the contract interpretation questions) are left for resolution, in the parties' discretion, in a forum which has responsibility for dealing with such specialized matters.

(3) On page 9 the last sentence in footnote 12 is amended to read as follows:

> "Currently there are approximately eleven ex-Whiting employees working at Plant No. 1."

This Amendment in no other way modifies or changes the findings in the Decision heretofore issued in the above-captioned case.

Dated at Chicago, Illinois, this 4th day of May, 1971.

/s/ ROSS M. MADDEN

Ross M. Madden, Regional Director
National Labor Relations Board
Thirteenth Region
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Chicago, Illinois 60604

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Thirteenth Region

UNION TANK CAR COMPANY *Employer-Petitioner* and LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS[1] *Union*	Case No. 13-UC-50

DECISION AND ORDER CLARIFYING A UNIT

A Petition was duly filed on March 10, 1971 under Section 9(b) of the National Labor Relations Act, as amended. The undersigned has carefully investigated and considered the facts and has considered the contentions of all parties.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in regard to the case to the undersigned Regional Director.

Upon the entire record in this case, the undersigned finds:

(1) The Employer-Petitioner (sometimes herein referred to as the Employer) is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

(2) The Employer seeks clarification of a production and maintenance unit at its facility located at 151st and Railroad Avenue, East Chicago, Indiana[2] and requests that the clarification of said unit specifically include the employees working in

1. Hereinafter referred to as Boilermakers.
2. Hereinafter referred to as Plant No. 1.

the finishing operations at Plant No. 1. The Employer's position is that the employees in the proposed clarified unit for Plant No. 1 are currently, and have always been, represented by the Boilermakers as their exclusive bargaining representative. The Boilermakers agree with the clarification as sought and the position of the Employer as outlined above.[3]

In addition, the Employer contends: that because an Arbitrator's Award (hereinafter discussed) requires the Employer to recognize Local 7-210, Oil Chemical & Atomic Workers Union,[4] as representative of the employees in the finishing operations at Plant No. 1 and to apply OCAW's Agreement with the Employer to the finishing operations at Plant No. 1, that the undersigned should in this decision hold that the award is "illegal" in violation of the National Labor Relations Act and of no force and effect and that the Employer's compliance with the award would be "illegal" in violation of the National Labor Relations Act.

In order to fully understand the clarification issue, certain background events must be recited.

1. The Employer has been for many years engaged in, and is currently engaged in, the manufacture of railway tank cars for lease and sale, and in the repair and maintenance of completed tank cars in several states throughout the United States, including Indiana. The only facilities involved here are located in East Chicago and Whiting, Indiana.

In 1945, the Boilermaker's were certified to represent the production and maintenance employees at a plant on Tod Avenue in East Chicago, Indiana, then owned and operated by Graver Tank and Manufacturing Corporation. From 1945 until 1957, the Boilermakers and Graver were parties to successive collec-

3. The Employer's and Boilermakers' requested that the Region proceed without a hearing. This decision is based upon the facts gathered during investigations in Case No. 13-CA-10068 and the record in the instant case.

4. Hereinafter referred to as OCAW.

tive bargaining agreements covering Graver's production and maintenance employees at the Tod Avenue Plant.

Graver was acquired by the Employer-Petitioner in 1957. The Boilermakers and the Employer were parties to successive collective bargaining agreements from 1957 until the latest agreement which was executed in 1968. These agreements covered all production and maintenance employees (including and excluding other classifications not involved herein), of the Employer at its East Chicago facilities, including Tod Avenue.

2. The Employer also operates a plant at Whiting, Indiana. In 1959 OCAW was certified to represent all employees performing finishing and repair and maintenance work at the Whiting plant, including and excluding other classifications not material to this case. From 1959 to the present, the Employer and the OCAW have been parties to successive collective bargaining agreements covering a unit substantially the same as the certified unit.

3. For several years, until the latter half of 1969, almost all new tank cars manufactured at the Tod Avenue plant, were transported to the Whiting facility (about three miles away), where the tank cars were completed; that is, final finishing operations on the shells of the tank cars were performed, such as painting, blasting, stenciling, foaming, hydrostating and the application of wheels, jackets and safety appliances to the tank cars.[5]

Until early 1970, the Whiting facility had traditionally engaged in finishing work on new tank cars and in repairing and maintaining damaged tank cars. The Whiting facility has not engaged in the initial production work on new tank cars.[6]

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5. As early as 1958 a small number of tank cars were completed except for the blasting and painting at Tod Avenue by Boilermakers. There is also evidence that finishing functions were performed sporadically at Tod Avenue by production and maintenance employees from 1958 up until 1969.

6. Hereinafter also referred to as fabrication operations.

In 1959 when OCAW was certified, the Whiting facility was primarily engaged in the repair and maintenance of damaged tank cars but was engaged also in finishing or car completion work on new tank cars. The ratio of time spent on finishing or car completion work to repair and maintenance work at Whiting gradually changed through the years, and from 1967 until 1969, Whiting was predominantly engaged in the final finishing operations on new tank cars. From early 1970 to date, the Whiting facility once again has been primarily engaged in repair and maintenance activities.

4. In 1966, the Employer acquired Plant No. 1 located at 151st and Railroad Avenue, East Chicago, Indiana, which is across the street from the Tod Avenue facility. Shortly thereafter the Employer began remodeling Plant No. 1, with the intention of building, for the first time, an integrated manufacturing facility so that new tank cars could be manufactured and completed at one facility without having to ship the cars elsewhere for finishing operations. Thus, the Employer planned as early as 1966 to engage in finishing operation at Plant No. 1.[7]

Plant No. 1 was completed in December 1969. During the period between 1966 and 1969, when Plant No. 1 was being remodeled, production and maintenance employees represented by the Boilermakers were being transferred from Tod Avenue plant to Plant No. 1. Neither newly hired employees nor employees from the Employer's other plants were assigned to Plant No. 1 until after Plant No. 1 was completed in 1969.

5. As early as April 1967, there were approximately 22 pro-

7. According to the Employer, in 1966 this facility was not being considered as a replacement for all other manufacturing facilities, and there was no intention of curtailing the finishing operations at Whiting. However, due to financial reasons such as market projections, general economic forecasts, and orders, the Employer decided, sometime after Plant No. 1 was completed that it would not be feasible to maintain Whiting as a finishing operation, and accordingly the major portion of the finishing operation was curtailed in late January or early February 1970, and Whiting went back to being a repair and maintenance facility as stated above.

duction and maintenance employees from the Tod Avenue plant permanently assigned to Plant No. 1. It is clear from the facts at the same time Plant No. 1 was being remodeled for full operation, the Tod Avenue tank car operation was being phased out. A slow build up of staff and activities at Plant No. 1 began about the time of the commencement of negotiations between the Boilermakers and the Employer prior to the March 1968 agreement. In these negotiations the Boilermakers and the Employer discussed the transfer of employees from Tod Avenue to Plant No. 1 and agreed that, to facilitate an orderly transfer, the 1968 collective bargaining agreement should cover both plants. Pursuant to the negotiation, the recognition clause in the 1968 Agreement covered the production and maintenance employees for both Plant No. 1 and Tod Avenue with inclusions and exclusions not material herein.

Although the fabrication operations at Plant No. 1 had already commenced in 1968, the finishing operations there did not begin until around June 1969, when, for the first time, former Tod Avenue employees were assigned to departments in the finishing operations. In late August of 1969 Plant No. 1 produced its first completely finished tank car, and by the end of December 1969, this plant had manufactured 375 finished tank cars.

By mid-September 1969, all five finishing departments were staffed. By the end of September 1969, the record shows that approximately four of the six different classifications in the five finishing departments were filled, and thirty of the thirty-five classifications in the entire plant were filled by former Tod Avenue employees.[8] By December 4, 1969 when the transfer of Tod

8. The number of classifications varied from time to time. Pursuant to the provisions in the Boilermakers 1968 Agreement, by July 1969, the Employer and the Boilermakers, by several administrative letters, had updated and consolidated the classifications in existence and had created 34 classifications. Eventually by January 1971, there were 38 classifications. Out of all the classifications, approximately four involved new job functions, two of which were created for the finishing operation at Plant No. 1.

Avenue employees to Plant No. 1 was completed, approximately ninety-five percent of the production and maintenance employees covered by the Boilermakers 1968 Agreement had been transferred to Plant No. 1. At that time Plant No. 1 was staffed for production purposes with only former Tod Avenue employees. These employees, at that time, filled four of the six classifications in finishing, and thirty-five of the thirty-eight classifications in the entire plant. On December 4, 1969, there were 653 production and maintenance employees at Plant No. 1, 71 of whom worked in the finishing operations.

In August 1970, peak employment at Plant No. 1 was reached with 813 production employees employed; 200 of whom worked in the finishing operations. The latest available employment figures for 1971 at Plant No. 1, shows 328 production and maintenance employees, including 72 who work in finishing.

6. Sometime in late 1969, OCAW was notified of the Employer's plans to curtail the finishing operations at Whiting. On December 15, 1969, OCAW initiated grievance and arbitration proceedings in which the Boilermakers did not participate. The issue at the arbitration was whether the Employer violated Article II, Section I, of the 1969 Agreement between OCAW and the Employer, which provided:

Section 1.

> This Agreement shall apply only to the operation of the Company at its Whiting, Indiana plant: Provided, however, if such plant or operation is moved to another location in the Calumet area, this Agreement shall apply to such other location.

OCAW's Grievance stated:

> The Company violated the Articles of Agreement dated February 23, 1969 specifically but not limited to Article II,

9. The figures reflecting the number of employees working in the finishing includes employees with what are referred to as "common" classifications, such as welders and maintenance men. Employees with such "common" classifications work in both the fabrication and finishing departments, depending on the work load and the need for such employees in a particular department at the time.

> Section 1, by notification to the Union that our contract would not apply to the new location, that benefits would be lost to employees, employees would lose seniority upon transfer, and that the Company would not recognize or bargain with the Union at the new location.
>
> The Union demands that the Agreement dated February 23, 1969 apply in its entirety after the operation, or any part thereof, had been moved to the new location.

The Employer contended *inter alia,* that the application of Article II, Section 1 to the finishing operations at Plant No. 1 would create an inappropriate unit and also violate Sections 8(a)(1) and (2) of the National Labor Relations Act.

On August 4, 1970, Arbitrator Platt issued his "Opinion and Award" and found that Article II, Section 1 should have been applied by the Employer to Plant No. 1, and that by failing to do so, the Employer violated Article II, Section 1 of the Agreement. On that question of remedy, the Arbitrator remanded the question to the Employer and OCAW for negotiation and settlement and reserved jurisdiction to finally decide the remedy question. The Arbitrator stated that he would not decide the legal issues of an appropriate unit or whether the application of Article II, Section 1, violated Sections 8(a)(1) and (2) of the Act. In his Opinion, Arbitrator Platt stated (55 LA 170, at 180):

> After careful and most anxious considerations, I have concluded that my primary responsibility as Arbitrator is to interpret the parties' agreement and not "to look beyond its borders for some external standard by which to nullify or restrict its operation."

In his Opinion, Arbitrator Platt also stated, after discussing the Employer's inappropriate unit contention (55 LA 170, at 181):

> Accordingly, in this case, I must decline to decide the legal questions raised. It need hardly be added that in doing so those questions (but not the contract interpretation questions) are left for resolution. In the parties' discretion, in a forum which has responsibility for dealing with such specialized matters.

Pursuant to the above decision the Employer and OCAW had several meetings in August and September 1970 in trying to settle the problem pursuant to the Arbitrator's Award. The Boilermakers learned of these meetings and filed unfair labor practice charges (Case No. 13-CA-10068) on September 2, 1970 and October 26, 1970 alleging, in substance, that the Employer violated Sections 8(a)(1), (2) and (5) of the Act, in bargaining and in refusing to cease bargaining with OCAW about the finishing portion of the Boilermakers' production and maintenance unit at Plant No. 1.

Pursuant to the charges, an investigation was conducted, and on November 4, 1970, a Complaint and Notice of Hearing issued wherein the General Counsel of the National Labor Relations Board alleged, in substance, that the Employer, by bargaining with OCAW about rights of employees working in the finishing operations at Plant No. 1, violated Sections 8(a)(1), (2) and (5) of the Act.

On November 9, 1970, Arbitrator Platt issued what he titled "Opinion and Final Award." In this Opinion, Arbitrator Platt referred to the above charges, and stated in pertinent part:

> (a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.

On March 9, 1971, OCAW, the Employer, and the Boilermakers entered into a stipulation whereby OCAW agreed to "neither claim nor bargain" with the Employer about OCAW's rights to represent employees at Plant No. 1, unless OCAW was certified pursuant to Section 9 of the Act in a unit at Plant No. 1 which was held appropriate for bargaining. The Boilermakers, in turn, agreed, as part of the stipulation, to move for withdrawal of the charge and complaint in Case No. 13-CA-10068. This was done, and the General Counsel then moved for withdrawal of the complaint. The Trial Examiner granted the motion and closed Case No. 13-CA-10068.

7. On March 24, 1971, David L. Cole, Impartial Umpire under the AFL-CIO, Internal Dispute Plan, pursuant to charges filed by the Boilermakers, ruled that OCAW's "filing and prosecution" of a representation petition[10] and other "related activities" constituted a violation of Section 2 of Article XX of the AFL-CIO Constitution. In substance, this section makes it unlawful for one affiliate to interfere with another affiliate's collective bargaining relationship. Umpire Cole refused to defer to the Arbitrator Platt's award because the award was not dispositive of the issues before him. Pursuant to Umpire Cole's decision, OCAW by letter, dated March 29, 1971, withdrew the previously filed Case Nos. 13-RC-12382 and 13-UC-49.[11] In addition, OCAW disclaimed interest in the instant case and specifically stated that it is not seeking representation rights for employees at Plant No. 1. However, on April 6, 1971, OCAW filed suit in the United States District Court, Northern District of Illinois to enforce Arbitrator Platt's award.

Having discussed the background necessary for a fuller understanding of this proceeding, the undersigned turns to the unit clarification issue.

The facts show that from at least August 1969, to date, Plant No. 1 has been operating as an integrated facility, manufacturing completed new tank cars. Plant No. 1 operates on an assembly line basis and the finishing operations are a continuum of the assembly line and part of the final production process. According to the Employer's production superintendent, a breakdown on one part of the assembly line would cause a stoppage in the rest of the production process. There is continuous and frequent interchange of employees between initial production (fab-

10. Case No. 13-RC-12382, filed by OCAW on February 25, 1971.

11. In Case No. 13-RC-12382, OCAW claimed representation rights for all production and maintenance employees working in the finishing operations at Plant No. 1. In Case No. 13-UC-49, OCAW requested that the Whiting unit as certified be clarified to include in addition to its certified unit all employees engaged in finishing operations at Plant No. 1 and the entire Calumet area.

rication) and final production (finishing) by way of permanent transfers (over 5 days), and temporary transfers back and forth between the finishing and fabrication areas. Over thirty-three percent of the classifications are referred to as "common" because the employees holding these classifications work either in all areas of the plant, or in both fabrication and finishing. Thus, it appears that many employees at Plant No. 1, possess skills enabling them to function effectively in both fabrication and finishing operations.

Some of the facilities and services commonly used by all production personnel, including employees in the finishing department are: loading docks, warehouses, cafeterias, washrooms and locker rooms, dispensary, parking lots, personnel and safety offices, entrance and exit gates, maintenance, material handling, quality control, and the credit union. There is common supervision of fabrication and finishing because the Plant Manager is responsible to the Vice-President of Operations for the entire production process, including the finishing operations. All employees are subject to the same labor relation policies and are paid from the same payroll office. Seniority is plant wide for layoff purposes and employees in fabrication and finishing may bump from one department to the other, if qualified. Finally, the Boilermakers Agreement is, and has been to date the only agreement covering the production and maintenance employees, including those doing finishing work at Plant No. 1.

The facts also show that ninety-five percent of the production and maintenance employees working at Tod Avenue transferred to Plant No. 1, and that the production and maintenance employees, while working at Tod Avenue performed finishing functions for many years, although said functions were not performed regularly or in large volume. As the employees from Tod Avenue possessed skills to perform most, if not all of the finishing operations at Plant No. 1, they were accordingly placed in finishing classifications as early as June 1969. The five finishing departments were staffed by Boilermakers from Tod Avenue

before there was any hiring at Plant No. 1.[12] Further proof of the ability of former Tod Avenue employees to perform finishing functions rests in the fact that by December 4, 1969, over 300 tank cars were manufactured with all finishing work completed and said cars were ready to be shipped to the customers. Moreover, while the finishing functions had been performed on a limited scale at Tod Avenue as compared to the finishing operations at Plant No. 1, no more than twenty-five percent of the production employees at Plant No. 1 were engaged in finishing at any time since operations commenced at Plant No. 1.

The foregoing demonstrates that the production and maintenance employees including those working in the finishing operations share a community of interest, and that the appropriate unit at Plant No. 1 is a plant wide production and maintenance unit, including employees working in the finishing operations.

Furthermore, in view of the above, the undersigned finds that the finishing operation at Plant No. 1 was not an addition of an entirely new function that did not exist at Tod Avenue, and further finds that Plant No. 1 was essentially a relocation with an accompanying expansion of the Tod Avenue operations, without major personnel changes.

With respect to Arbitrator Platt's Award, the law is clear that before the Board will consider deferring to arbitration, the Arbitrator's Award must deal with the issue which is before the Board. *Raytheon Company*, 140 NLRB 883; *The Horn & Hardart Company*, 173 NLRB No. 164. Here, the issue is whether or not the Boilermakers' production and maintenance unit, which would include employees working in finishing opera-

12. There were also some ex-Whiting employees hired at Plant No. 1 as new employees in late January and early February 1970. However, when these employees were placed in all areas of the plant, most of them were placed in the finishing operations, but they never constituted a majority of the employee complement in finishing. All ex-Whiting employees were given recall rights at Whiting and many of them since February 1970, have accepted employment back at Whiting which is still in operation. Currently there are *no* ex-Whiting emloyees working at Plant No. 1.

tions, is the appropriate unit at Plant No. 1. Arbitrator Platt specifically declined to decide the unit question. Moreover, it is well established that in representation case, the Board does not normally defer to arbitrators decisions for the reason that, as Platt pointed out, his responsibility as Arbitrator was to interpret a contract, not to determine an appropriate unit question using Board criteria. As aptly stated by the Board in *Westinghouse Electric Corp.*, 162 NLRB 768 at 771.

> ". . . the ultimate issue of representation could not be decided by the Arbitrator on the basis of his interpreting the contract under which he was authorized to act, but could only be resolved by utilization of Board criteria for making unit determinations."

In conclusion, the undersigned finds that Arbitrator Platt's decision is not dispositive of the issue here, and accordingly, will not defer to it in this case. The undersigned finds that the appropriate unit at Plant No. 1 is a plant wide production and maintenance unit, including the finishing operations, and that the employees in this unit are presently, and have been since June 1969, represented by the Boilermakers as their exclusive bargaining representative.[13]

ORDER

It is hereby ordered that the unit at Plant No. 1, represented by the Boilermakers be, and it is hereby, clarified to read as follows:[14]

> "All production and maintenance employees, including such employees working in the finishing operations and hourly paid gang leaders employed by the Union Tank

13. The findings herein dispose of the Employer's other contentions.

14. This unit description is the same description as appears in the latest Agreement between the Employer and the Boilermakers with the addition of the phrase "including such employees working in the finishing operations." This Decision is not a recertification of the Boilermakers as bargaining agent.

Car Company at its plant at 151st and Railroad Avenue, East Chicago, Indiana, excluding salaried employees, guards, watchmen, janitors, matrons, engineers, office and shop clerical employees and also excluding the field construction, field erection and field maintenance employees when working outside the plant."

Dated at Chicago, Illinois, this 28th day of April, 1971.

/s/ Ross M. Madden

Ross M. Madden, Regional Director
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Thirteenth Region
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Chicago, Illinois 60604

In the Matter of the Arbitration
Between:
UNION TANK CAR COMPANY
and
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND ITS LOCAL 7-210

OPINION AND FINAL AWARD

On October 19, 1970, the Arbitrator rendered the following Opinion and Proposed Award in this case:

Upon consideration of the Union's request, dated October 13, 1970 (of which, I am informed, Company counsel had notice), that the Arbitrator reassert his jurisdiction in this case for the purpose of granting a remedy to the Union for breach of the collective Agreement in effect between the parties, the Arbitrator finds and determines as follows:

1. On August 4, 1970, the Arbitrator rendered an award in this case as follows:

On the evidence in this case it is determined:

1. The Union grievance was not untimely filed and it is arbitrable.

2. An order of interpleader to require the joinder of the Boilermakers Union is unnecessary.

3. Article II, Section 1 of the OCAW Agreement, reasonably construed, requires application of the Agreement to the finishing operation which was moved from the Whiting Plant to Plant No. 1.

4. The Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1.

5. The question of the nature and extent of relief to be granted in this case is remanded to the parties for

negotiation and settlement, failing which, within a reasonable period from the date hereof, either party may resubmit that question for the Arbitrator's determination.

6. The Arbitrator reserves jurisdiction to finally decide the remedy question, with or without a further hearing, if and when it is resubmitted to him.

2. In accordance with paragraph 5 of the award, the parties met at various times in efforts to resolve the question of the nature and extent of the remedy to which the Union may be entitled as a result of the breach of Article II, Section 1 of the Agreement. Those efforts, made over a reasonable period since the date of the award, were unsuccessful and the question remains unresolved.

3. On September 2, 1970, the Boilermakers Union, Local 374 filed unfair labor practice charges alleging that the Company was violating the National Labor Relations Act by bargaining with Local 7-210 of the OCAW in regard to the Finishing Department of Union Tank Plant No. 1. The charges are still pending, although the Regional office of the NLRB advised the Company on September 22, 1970, that "absent settlement between the parties a Complaint and Notice of Hearing will issue shortly." If such complaint is issued, the Arbitrator is informed that a decision on the charges may not be forthcoming for two years or more. However, as the Arbitrator is further informed, if the parties or either of them will institute proceedings under the NLRA for unit clarification or union representation an earlier resolution of those questions is possible.

4. In view of the pendency of the NLRB charges, the Company, on September 30, 1970, requested the Arbitrator to advise the parties

> that it was the essence of your award that the legal issues raised be first clarified and decided by the National Labor Relations Board and that no further proceedings before you will be held until that occurred and then only if in the light of, and consistent with, the Board's decision further

proceedings would appear to be justified. In making this suggestion the Company is, of course, not waiving any objections it might have to a hearing before the Arbitrator after the legal questions specifically left unanswered by your award have been determined.

5. Interpreting the above as a request for postponing consideration of the Union's request for an appropriate remedy, the Arbitrator wrote the parties on October 5, 1970, suggesting that it would be in their own best interest to settle the unresolved question themselves and adding that if they "thought that a conference with me to further review the requests which are now before me would be helpful, I will be glad to meet with you next Monday, October 12, at my office." Counsel for the Union appeared at my office that day; Company counsel did not.

6. In consequence of the parties' failure over a reasonable period to settle the question of an appropriate remedy for the Company's breach of the Agreement, the Union's resubmission of that question to the Arbitrator's determination is timely, proper, and in accord with the terms of the award. Under the circumstances, the Arbitrator has no alternative but to exercise his reserved jurisdiction and render a final award in this case. Indeed, to decline to do so would demean the arbitration process and be violative of his own award.

7. The prior award in this case determined that the Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1. Having so determined the Arbitrator has authority under the Agreement to award an appropriate remedy for such violation.

8. The Union requests the following relief:

1. Recognition and application of the OCAW contract for any finishing operation performed at Plant No. 1, including the attendant indirect labor involved in that operation.

In the alternative the Union is seeking the reestablishment of the Whiting operation on a scale and size com-

mensurate with the Employer's finishing operation at Plant No. 1.

2. Recall and reinstatement of all employees, including quits, layoffs, retirees, who lost employment as a result of the transfer of the operation and the recognition of the Boilermakers for that operation at the new plant.

3. Reimbursement to all OCAW-represented employees of any lost wages and benefits, including health and welfare and retirement benefits caused by the violation of the contract, the recognition of the Boilermakers, and the application of the Boilermakers' contract.

4. The reimbursement to the OCAW of all lost dues and initiation fees.

5. Any other and further relief as may be appropriate to make the Union and its employees whole under the circumstances.

9. As the Arbitrator understands, it is the Company's contention that Article II, Section 1 of the Agreement is illegal and unenforceable for the reason that application of the OCAW Agreement to the finishing operations in Plant No. 1 will require it to commit an unfair labor practice, in violation of the NLRA and therefore no action should be taken by the Arbitrator on the Union's request for remedial relief. I do not agree. The above contention of the Company was not decided by the Arbitrator because he had concluded that his primary responsibility was to interpret the parties' Agreement and not to look beyond its borders for some external standard by which to nullify or restrict its operation. Patently, the Arbitrator acted within his conceded authority to interpret Article II, Secion 1 of the parties' Agreement and, in doing so, found a violation of its terms by the Company. It is a sound and just principle in arbitration, as in law, that where a breach of an agreement has been found an appropriate remedy should be awarded.

10. Upon due consideration, the Arbitrator awards as follows:

(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.

(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section 1 as heretofore determined.

11. On the date of the above Proposed Award, the Arbitrator sent copies to the parties with notice of a hearing to be held at the Arbitrator's office on November 5, 1970, "on exceptions, if any, to the attached proposed Final Award." Pursuant to such notice counsel for each party appeared before the Arbitrator for discussion and argument of the Company's written exceptions to the proposed Award which, in pertinent part, are as follows:

> This letter will serve as the Company's exceptions to your "Proposed Opinion and Final Award" dated October 19, 1970 and to inform you that we will appear at your offices on November 5, 1970 at 1:00 p.m., out of courtesy, pursuant to your request, but without conferring jurisdiction upon you in any respect.
>
> Even though you recognized the legal questions raised in Paragraph 10(a) of your "Proposed Opinion and Final Award" by providing ". . . Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1," your order in Paragraph 10(b) is improper, irrespective of any other considerations, because the original grievance only requested: "The Union demands that the Agreement dated February 23, 1969 apply in its entirety after the operation, or any part thereof, has been moved to the new location" and you have exceeded your authority under the submission to you and the limits on your authority as set forth in the collective bargaining agreement.

As we indicated to you in our letter dated October 20, 1970, which we herein reiterate and incorporate by reference, we except to any remedy in this matter on the basis of the illegality of your award.

By writing this letter and incorporating our October 20, 1970 letter to you, and by appearing at the hearing scheduled by you on November 5, the Company makes it expressly understood that it in no way waives any other defenses that it may have.

12. Upon due consideration of the stated exceptions, the Arbitrator finds they are unmeritorious. Having earlier found a breach of the Agreement by the Company the Arbitrator has authority to fashion a remedy, if need be, to redress the loss suffered by the employees as a result of such breach. Nor do I find that to render an award of compensatory damages in the circumstances of this case exceeds the Arbitrator's authority under Article IX or any provision of the Agreement. While I am informed the NLRB has issued an unfair labor practice complaint against the Company, I do not consider it a bar to my rendering a final award in this case. On the contrary, not to do so would, in my opinion, be an abuse of my arbitral authority and discretion. Accordingly, I make the following *Final Award*:

(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.

(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section 1 as heretofore determined.

/s/ HARRY H. PLATT
Harry H. Platt,
Arbitrator

November 6, 1970.

In the Matter of the Arbitration Between:

UNION TANK CAR COMPANY

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and its LOCAL 7-210.

OPINION AND AWARD

This arbitration is pursuant to Article IX, Section 3 of the collective Agreement between Union Tank Car Company and Oil, Chemical and Atomic Workers International Union, and its Local 7-210, effective February 23, 1969 to February 23, 1971. The central issue is whether the Company violated Article II, Section 1 of the Agreement by refusing to apply the Agreement to employees and operations transferred from its plant in Whiting, Indiana to a new plant in East Chicago, Indiana. A threshold question concerns whether the instant grievance was timely filed and is arbitrable. The undersigned, selected jointly by the parties as arbitrator, held a hearing on March 12, 1970 at which evidence was presented. Both parties thereafter filed post-hearing briefs. Present and participating in the proceeding were:

For the Company

Harvey M. Adelstein, Esq.	Seyfarth, Shaw, Fairweather and Geraldson, Attorneys
John E. Shea	Director, Industrial Relations
Robert W. Thornburg	Vice President-Manufacturing

For the Union

Arnold E. Charnin, Esq.	Kleiman, Cornfield and Feldman, Attorneys
Tyler Swanson	Chief Staff Representative
A. F. Schilling	President, Local 7-210
Joseph Ziatonich	Committeeman
George N. Mavronicles	Committeeman

Factual Background

The Company is engaged in the manufacture of railway tank cars and in repair and maintenance of completed tank cars in East Chicago and Whiting, Indiana. For years the tank car shells were built in the Company's Graver Plant in East Chicago and then shipped to its Whiting Plant for the final finishing work. The finishing of tank cars involves putting wheels on the shells, hydrostatic testing for leaks, insulation, adding jackets including foaming, rolling, coating and building the jacket around the shell, adding handrails, airbrakes, and running boards, painting, blasting, and stenciling.

The grieving Union, Oil Chemical and Atomic Workers International Union, Local 7-210 (OCAW) has represented the employees at the Company's Whiting Plant since 1959. The Union representing the Graver Plant employees in East Chicago since 1945 has been the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 374. Both East Chicago and Whiting are in the Calumet area of Indiana.

In 1966, the Company purchased a vacated plant about three miles away from its Whiting Plant and across the street from its Graver Plant, in East Chicago. The Plant, since remodelled and known as Plant No. 1, was designed and built as an integrated tank car manufacturing plant, with the object of using it as an additional manufacturing facility in the Calmet area. In late 1966, the Company received a special order for foam insulated

tank cars which, because of time schedules, it decided to have built and finished in Plant No. 1. When OCAW learned that Graver Plant employees (Boilermakers) were doing the work, it protested and filed a grievance charging a violation of Article II, Section 1 of its Agreement. In the grievance discussions which followed, the Company declared that the protested job was only a temporary one and that the employees assigned on it would return to the Graver Plant when it was finished. As agreed in the discussions, the Company notified both OCAW and the Boilermakers Union by letter that "nothing relating to any temporary assignments to Plant No. 1 is to be construed as prejudicial to or in support of any claims, by either the Boilermakers or OCAW, to rights of employee representation at Plant No. 1 when Plant No. 1 is in regular and permanent operation."

On March 31, 1968, the Company and the Boilermakers Union negotiated a successor Agreement to replace the one which expired on that date. In that Agreement, the Boilermakers recognition as bargaining agent was extended to Plant No. 1. The Agreement also states that "inasmuch as a substantial portion of the work presently performed" in the Graver Plant "may be transferred" to Plant No. 1 during the life of the renewed Agreement, a separate collective Agreement will be entered into on behalf of the Graver Division at such time and all references to the Graver facility in the renewed Boilermakers Agreement will be inoperative.

On February 23, 1969, the Company and OCAW also renewed their Agreement which was expiring on that date. In the course of the negotiations, OCAW was handed a copy of the 1968 Boilermakers Agreement which, as noted, provided for recognition of the Boilermakers Union at Plant No. 1. The Union negotiators responded that whether or not another Union represented the employees on the fabricating operations at the new plant, it was OCAW's position that if all or a portion of the finishing operations were moved from Whiting to another plant in the Calumet aera, the Company would be obligated under

Article II, Section 1, to apply the OCAW Agreement to those operations. In the discussions, the Company negotiators represented to the Union that it was the Company's intention to continue the finishing operation at Whiting and that they foresaw no curtailment of those operations in the near future.

A few months later, on September 12, 1969, OCAW was informed that marketing conditions made it infeasible for the Company to maintain dual tank car manufacturing facilities in the Calumet area and that in addition to moving the Graver Plant fabricating operation to Plant No. 1 it was considering a possible curtailment of the Whiting finishing operation and establishing it at Plant No. 1. The subject was again discussed at a meeting on September 24, 1969, when the Company stated it had decided to relocate the tank car finishing operations and to convert the Whiting Plant to a car repair and maintenance facility. Further discussions were held in several later meetings, including discussion of the possible effects of the contemplated Company action on the employees' seniority and benefits and other contract rights. In all those discussions the Union persisted in its position that the Company was obligated under Article II, Section 1 to apply the OCAW Agreement to the employees and operations moved from the Whiting Plant to Plant No. 1. The Company also persisted in its position. It was that inasmuch as it had already extended recognition to the Boilermakers Union in Plant No. 1 it would not lawfully recognize OCAW or apply the OCAW Agreement to any employees or operations in that Plant. It did however offer preferential hiring rights in Plant No. 1 to all Whiting employees, with accumulated seniority for benefit purposes but not for promotion and layoff purposes. Subsequently, at a meeting on December 8, 1969, the parties and their counsel explored the problem areas more fully, including legal questions pertaining to the transfer of the tank car finishing operations from Whiting. Among other things, there was detailed discussion of the Plant No. 1 layout, division of work, assembly line operations, and other working

conditions. Finally, on failure to resolve their differences, the Union filed the instant grievance on December 15, 1969, charging the Company with violating the February 23, 1969 OCAW Agreement and requesting that the agreement be applied "in its entirety after the operation, or any part thereof, has been moved to the new location."

The curtailment and relocation of the Whiting operations began late in January and was completed on February 26, 1970. Since that date, all tank car manufacturing and finishing operations have been performed in Plant No. 1. In response to the Company's offer of employment, 85 out of about 162 of the Whiting employees accepted jobs in Plant No. 1. Of the remainder, 62 stayed at Whiting to do car repair and maintenance work and the rest were either laid off, retired or quit. At the time of the arbitration hearing, about 60 of the ex-Whiting employees were working on tank car finishing operations and the rest held indirect labor jobs. When the Graver Plant fabricating operations were transferred earlier, about 550 Graver employees went with the operations to Plant No. 1 while 55 remained at Graver.

The basic finishing operations at Plant No. 1 are the same as at Whiting. Some welding machines and foam machines were brought with the operating from Whiting, but all other equipment in Plant No. 1 is new, tape-controlled, automated or semi-automated. The fabricating and finishing operations in the new Plant are largely physically separated. The fabricating operations are performed in an area west of a wall which is designated "M" on the Company plat while the finishing operations are performed within a circumscribed and walled area east of the "M" wall, between "M" and "R", and in an area across a transfer table where hydrostatic testing, foaming and jacket fabrication are performed. Boilermakers Union members and ex-Whiting employees work on the finishing operations, including welding and indirect labor. The same tasks are performed on the finishing operation in Plant No. 1 as were performed at

Whiting and the same skills are applied to them. Generally, the same classification structure and, with few exceptions, the same job classifications exist at Plant No. 1 as at Whiting. Hourly wage rates are also generally the same, as are employee earnings—with one important difference: the Whiting employees on direct labor jobs worked under an incentive system which yielded substantially higher earnings than is possible under the Boilermakers Agreement. Also, benefit coverage is more favorable in some respects under the OCAW Agreement than under the Boilermakers Agreement. In addition, OCAW has a profit-sharing plan while the Boilermakers do not.

The relevant Agreement provisions are:

> ARTICLE II—Recognition; Union Security; Checkoff
>
> *Section 1.* This Agreement shall apply only to the operations of the Company at its Whiting, Indiana plant; provided, however, if such plant or operation is moved to another location in the Calumet area, this Agreement shall also apply to such other location.
>
> *Section 2.* The Company recognizes the Union as the sole collective bargaining agency for all employees at its Whiting, Indiana plant or on the payroll of such plant, including all clerical employees, office employees and seasonal employees, but excluding watchmen, professional employees, confidential employees, and all supervisors, as certified by the National Labor Relations Board in Case No. 13-RC-6260, with respect to rates of pay, wages, hours of work and other conditions of employment.
>
> ARTICLE IX—Grievance Procedure and Arbitration
>
> *Section 2.* A grievance is a dispute or difference of opinion between the Company and an employee or a group of employees, or between the Company and the Union, with respect to matters covered by this Agreement. *Except as otherwise provided in this Agreement, a grievance must be presented to the Company within ten (10) working days after the occurrence of the event giving rise to the grievance,* or it shall be considered waived.
>
> *Section 3.* Grievances shall be processed in the following manner:

Step 4: The arbitrator shall have authority only to interpret and apply the provisions of this Agreement and to decide the particular dispute submitted to him. He shall have no authority to add to, delete from, or in any way modify any provisions of this Agreement.

Position of the Parties

The Union's position is that Article II, Section 1 clearly and unambiguously obligates the Company, in the event it moves the Whiting Plant or operation to another location in the Calumet area, to apply the OCAW Agreement to such other plant or operation. It says the terms "operation" and "plant" connote work and machinery or apparatus used in carrying on an operation and Article II, Section 1 was designed to preserve the employees' rights under the OCAW Agreement in case of a relocation of the plant or transfer of the machinery, operation, and work normally performed by them to another location in the Calumet area. In the Union's view, if absurd and unjust results are to be avoided, Article II, Section 1 must be interpreted to mean that "if part or the whole operation, plant, machinery (old or new), or work, is moved within the Calumet area the contract protects the employees who would invariably suffer otherwise." The Union's overall position is more fully stated as follows:

> The Employer has known since negotiations in 1959 and in all contract negotiations thereafter that the Union was concerned about the potential of a removal of the plant or operation from Whiting. Accordingly, the Employer and the Union negotiated a specific, clear and unambiguous contract provision to maintain the protection of the contract for its employee-members upon such transfer within the Calumet Area. The Employer's actions were a flagrant breach of that contract protection, and of the normal protections afforded by the very nature of a collective bargaining agreement.
>
> In the 1969 negotiations, the Employer was made aware of the Union's concern about the future operation at Plant

No. 1, and gave the Union assurances that the operation at that plant would have no effect on Whiting. The Employer claims that at these negotiations, it gave the Union letters, apparently unsigned, concerning the vesting of pension benefits and preferential hire at Plant No. 1. The Union denies receipt of the letters of alleged agreement, although it admits discussion of pension benefits to increase the contribution and accommodate vesting for laid off or transferred employees. Clearly, George Mavronicles (who waxed eloquently that his testimony was true), is to be believed when he denies receipt of any letters of agreement.

However, even assuming that the Company letters were presented to the Union, they did not act as a waiver of the Union's position on the application of Article II, Section 1. The Employer admits that throughout the 1969 negotiations, the Union insisted that the work carries the contract with it within the Calumet area. The Union never relinquished its position on the applicability of Article II, Section 1. Nor did the Employer ever state to the Union in the 1969 negotiations that the contract of the OCAW was inapplicable at Plant No. 1.

The Union's position is further buttressed by the Employer's claim that during the 1969 negotiations it had no knowledge as to when any complete integration of the new plant car manufacturing would occur. It was not until the 2nd or 3rd quarter of 1969 that Plant No. 1 was regarded as other than a 'white elephant', or capable of sustaining an operation that included the Whiting operation. Therefore, the Company could not have negotiated in 1969 concerning the termination of Whiting, as there were no plans to terminate that operation.

In 1966, the OCAW had expressed its position clearly with regard to Plant No. 1. At that time only a modest portion of the Whiting operation had been transferred, but the OCAW had meetings with the Employer, which included the presence of OCAW International counsel, and which culminated in the filing of a grievance that has not been withdrawn to this date. The OCAW at that time informed the Employer that if OCAW work is to be performed at Plant No. 1, the OCAW contract applies and

OCAW-represented employees must do the work. The Employer made no attempt to suggest that the contract was inapplicable, but instead terminated the operation and confirmed by letter to the Union that the mere fact of the temporary transfer did not affect OCAW rights at the new plant.

In summary, if the Company is contending that the OCAW negotiated away Article II, Section 1, in 1969, (1) that is in clear conflict with the Employer's position that the Union repeatedly insisted that its contract goes with the operation; (2) that the Employer had no specific plans for Plant No. 1 at the time of the 1969 negotiations; (3) that the Union had filed a grievance in 1966 alleging that if part of its operation moved, the contract and employees go with that operation; (4) that the Employer never answered the 1966 grievance with the claim that the OCAW contract was inapplicable; (5) that the OCAW never consciously waived any rights as to the new plant.

Similarly, although the Employer presented letters between it and the Boilermakers requesting preferential hire of Whiting employees, and finally agreed upon such hire provided that seniority would be limited to 30 days and the remaining seniority of Whiting employees would be wiped out, e.g., a 30-year employee would be allowed up to 30 days seniority in return for his tenure, those letters were sent after the Company notice of termination to the OCAW in September, 1969, and after and during the time that Tyler Swanson, as the International Representative of the OCAW, informed the Company that OCAW was demanding recognition and application of the contract at the new plant.

However, there are other and even more significant reasons to believe that the Employer acted in a manner that is known in the common parlance as a runaway shop.

At the time that it granted the Boilermakers recognition at Plant No. 1 there were only 50 employees at that plant. In other words, there was no operation in 1968 worthy of being covered by a contract. It gave the Boilermakers a deal on an incomplete and unplanned plant, obviously in an attempt to terminate the OCAW contract and claims at the new plant.

When the Employer gave recognition to the Boilermakers it reneged on its agreement on the 1966 grievance that neither Unions' rights would be affected by operations at the new plant, and that both Unions would be consulted before action was taken by it to give rights to either one.

Had the Employer acted in good faith it could readily have granted recognition (for each Union) at Plant No. 1 dependent on the nature of the operation to be performed at that Plant.

At the time of the negotiations of the 1969 agreement, the Employer had approximately 10-20 employees who may have been performing the traditional Whiting operation at Plant No. 1. Yet the Employer never informed the OCAW of that fact during such negotiations, but instead gave assurances to the OCAW that the Whiting operation would remain intact.

The Employer waited until the OCAW was sewn into a collective bargaining agreement containing a no-strike clause before it informed the OCAW that it was divesting them of their contract rights at Plant No. 1. Thus, the OCAW lost its most effective weapon to enforce its demands concerning application of its contract to the new plant.

The Employer started hiring employees into the Boilermaker unit to perform the finishing operation during 1969, unbeknownst to the OCAW.

The OCAW-represented employees lost every benefit earned through more than 10 years of negotiations because of the denial of recognition and application of its contract. 30-year employees were allowed 30 days seniority for promotion, layoff and recall. Jobs had already been assigned to Boilermakers that were traditionally performed by the OCAW employees. Wages earned by the OCAW-represented employees were cut in half under the Boilermaker contract. Health and welfare and retirement and profit sharing benefits were cut in half or disappeared completely. In this latter regard it is ludicrous to assume that these rights and benefits were traded by OCAW solely for the benefits of an early vesting of pension funds, for preferential hiring with almost total loss of seniority, and for

an improved bumping procedure, as the Company suggests. The economic benefit to the Employer in this destruction of the economic benefits to OCAW employees was enormous, and readily suggests the reasons for the undercover speedy recognition given to the Boilermakers.

The so-called integrated operation that the Employer contends is the basis for the new plant, and the basis for its need to recognize a single Union, is a pretext. OCAW employees, without any training in the new plant, perform the exact same operation that they performed at Whiting, within an enclosed area that separates them from the Graver or Boilermaker employees as effectively as if they worked in separate plants. The only OCAW employees not segregated into this area are a modest contingent of indirect labor that could probably readily be employed to work on the finishing operation. This lends further credence to the OCAW contention that the reason for the move was basically to lower labor costs by depriving employees of negotiated benefits.

All of the foregoing facts demonstrate that the Employer acted in bad faith and in violation of its contract with the OCAW.

The Union denies that the grievance in this case was untimely filed, as claimed by the Company. In any event, it says, it is a continuing grievance and is not subject to the contractual filing time limits. Finally, the Union calls attention to the fact that although requested to do so, the Boilermakers Union has refused to join in this proceeding and it urges the arbitrator that should he deem it necessary, because of the possible impact of his award on the Boilermakers Union, he may interplead that Union by an arbitral order which may be enforced in the courts.

The Company's position is, first of all, that the instant grievance was untimely presented. Article IX, Section 2 requires a grievance to be filed within ten working days after the occurence of the event grieved. In this case, the Company notes, the Union was informed of a possible curtailment of finishing operations at the Whiting, Indiana Plant on September 12, 1969, but failed to

file a grievance until December 15, 1969. The Company argues that strict enforcement of contractual time limits on filing grievances is required "not only by the necessity for respecting the terms of the parties' agreement, but also by important policy reasons arising from sound industrial practice as well." It therefore urges the arbitrator to determine that the contractual time limits on filing the instant grievance have not been satisfied and that the grievance is not arbitrable.

Regarding the suggested interpleader of the Boilermakers Union in this proceeding, the Company asserts that even if arbitral authority existed to make such an order, which it questions, the present case does not present an appropriate occasion for its exercise because the disputed issue involves an interpretation of a provision of the OCAW Agreement to which the Boilermakers are not a party "and therefore have nothing relevant to add to its interpretation." In any case, says the Company, inasmuch as it is not disputing the arbitrability of the subject-matter of the dispute, if the grievance was timely filed, nor the arbitrator's authority to decide the case without the participation of the Boilermakers "there is no need for him to even reach the issue of the Boilermakers non-participation."

On the merits, the Company's position is that it is not obligated under any contractual provision to extend the OCAW Agreement to any of the operations or employees in Plant No. 1. Article II, Section 1, it says, requires application of that Agreement only where the entire Whiting Plant or operation has been moved, not when a portion of the plant or operation is moved. It notes that the Whiting operation consisted of two distinct activities: performing finishing work on tank cars and repairing tank cars, and it stresses that only the former was transferred to Plant No. 1. In 1967, the Company asserts, OCAW proposed that Article II, Section 1 be amended by adding the words "or any phase of operation" after the word "operation" and again, in 1969, that the words "any part of its operation" be added to Article II, Section 1, both of which proposals were rejected. In

the Company's view, the fact that the proposals were made proves that Article II, Section 1 was concerned only with removal of the plant or the entire operation, not a portion of the operation.

Further, the Company maintains, OCAW's demands for seniority changes, severance pay, expanded layoff procedures, a letter regarding profit-sharing, preferential hiring rights at Plant No. 1, and its unsuccessful organizational efforts cannot be reconciled with an interpretation of Article II, Section 1 which requires the Whiting Agreement to "follow the moving of a part of the operations". But even if Article II, Section 1 could be read as comprehending a transfer of a portion of an operation, the transfer of the Whiting finishing operations to Plant No. 1, it urges, is not the kind of move contemplated by it "because the work which was moved was completely integrated with the manufacture of the shells in a unique production line arrangement using much new, completely different equipment and many different employees."

In addition, the Company contends that when Sections 1 and 2 of Article II, are read together, it must be concluded that lawful recognition of OCAW at Plant No. 1 is a necessary precondition to applying its Agreement there and, since it has not achieved recognition in Plant No. 1, either by NLRB order or by agreement, it would be a violation of Section 8(a)(2) of the NLRA to apply the OCAW Agreement in that plant. Nor would it make any difference if the Agreement's application were to be limited to the ex-Whiting employees and to just the finishing work. In the Company's view, "in addition to the unlawfulness, of forcing a bargaining agent upon employees without their prior designation of such agent, applying the contract to a part of the operations at Plant No. 1 would impose an inappropriate bargaining unit in direct contradiction with Labor Board rulings."

Finally, the Company contends that because application of the Whiting Agreement to Plant No. 1 would interfere with the Boilermakers' certification and its members' statutory and con-

tractual rights, an award requiring it to apply the OCAW Agreement to Plant No. 1 would compel the parties to violate the NLRA and such an award would be unenforceable and "do nothing to resolve any unresolved disputes between the parties." The Company accordingly requests that the grievance be denied.

Discussion

I

At the threshold of this dispute is a question of procedural arbitrability. The Company, noting that the Union's grievance, dated December 15, 1969, refers to a "notification that our contract would not apply to the new location . . . and that the Company would not recognize or bargain with the Union at the new location", maintains that the "notification referred to occurred at the latest on September 12, 1969" and hence the grievance was untimely presented and is non-arbitrable. I disagree.

It goes without saying, that to be fully effective a grievance procedure, as well as the agreement of which it is a part, must be respected and honored. Time limits for filing and processing grievances provide an element of order to the grievance procedure. Nevertheless, it is a salutary rule that, given the basic purpose of the grievance procedure, procedural and technical bars to consideration of grievances on their merits should be strictly construed. There are variations, of course, in the use of the grievance procedure as well as in provisions prescribing time limits. Agreement provisions which set time limits for filing grievances usually refer to a specific number of days after an aggrieved employee or Union "knew, or by reasonable diligence could have known of the occurrence of the act upon which the grievance is based", or a time "after the date on which the facts or events upon which such alleged grievance is based shall have existed or occurred", or, as in this case, a date "within ten (10) working days after the occurrence of the event giving rise the grievance".

The Company's assertion that the event which gave rise to the instant grievance occurred at the latest on September 12, 1969, is erroneous, in my opinion. For one thing, there is no suggestion in Article IX, Section 2 that the time for filing grievances starts to run when the Union is informed or otherwise obtains knowledge of a contemplated action which, if and when it occurs, may give rise to a grievance. What it says is that the grievance must be presented within ten working days after the *event giving rise to it has occurred*. Nor is there evidence of positive intention that advance discussion of a contemplated removal of machinery and work from the coverage of the Agreement was to constitute an "event" giving rise to a grievance. While the grievance does read as though "notification" of the Company contemplated action is the gravamen of the Union's complaint, it is inconceivable to me that the Company was mislead, or prejudiced in any way by such a reading.

However, even if it were concluded that "notification" of the contemplated relocation of the Whiting finishing operation was the event which gave rise to the grievance, it is more reasonable to believe that the notification referred to was received on December 8 rather than September 12. It was then that the parties and their counsel met in an effort to finally resolve the Union's claimed right to extension of its Agreement to all tank car finishing operations performed and to be performed within the Calumet area. Indeed, from all that appears, the September 12 meeting was but a prelude to the later discussions. Significantly, the Company's own brief states that what the Union was told on September 12 was that the Company was "considering" the "possible curtailment" of manufacturing operations at the Whiting Plant and the "possibility" of converting it to a tank car repair and maintenance facility. Clearly, no overt action occurred on or before September 12 which gave cause for a grievance. While to be sure, the mentioned curtailment and relocation of the Whiting finishing operation was discussed in the September 24 meeting with more positiveness, no curtail-

ment of operations had occurred even then and also the effects of the contemplated Company action on the employees were not fully known then. Surely, the Union was entitled to determine before it filed any grievance what effect removal of the finishing operations from Whiting would have upon the employees and their rights under the Agreement—which is what it sought to do in the several meetings held after September 12.

To be sure, the meetings occasioned some bargaining about the effects of the Company's contemplated action but there is no evidence whatever to indicate that by engaging in such bargaining the Union had elected to forego its right to file a grievance. In fact, the evidence is undisputed that the Union insisted at every meeting that a relocation of the Whiting finishing operation without applying the OCAW Agreement to it at the new location would be a violation of the Agreement and implied, if it did not directly state, that a grievance would be filed. Against this backdrop and in the specific context of this case, I cannot conclude that the grievance was untimely filed. If anything, it may have been prematurely presented inasmuch as the removal of the work and machinery from the Whiting Plant and the transfer, layoff, and retirement of Whiting employees did not commence until January 26, 1970. However, the Company does not object to the grievance on the ground that it was prematurely presented.

Furthermore, the grievance in this case is based on a *continuing* violation of Article II, Section 1. It is the Union's claim that the Company's refusal to apply the OCAW Agreement to the relocated Whiting operation is a violation of the Agreement which continues to be a violation so long as the Agreement is not applied in its entirety to that operation and to the employees on it. Now, a continuing violation should, of course, be subject to corrections as long as it continues to be a violation. For instance, a delay in protesting an erroneous classification of an employee may not of itself prevent correction of the error for the future, if the classification continues to be erroneous, even

though retroactive financial adjustment may be barred. Likewise, an improper discontinuance of an incentive system or denial of earnings and benefits to which an employee is entitled under the Agreement is a continuing violation and may be subject to correction despite passage of time. In this case, failure to apply the wage, incentive pay, seniority and other provisions of the OCAW Agreement to the employees and operations moved from the Whiting Plant to Plant No. 1, if a violation, is a violation which is subject to challenge through the grievance procedure so long as it continues. In the circumstances, I must conclude that the Union's grievance in this case is arbitrable.

Another preliminary question—one raised by the Union—is whether because of the possible impact of the Arbitrator's award on the Boilermakers Union, an award in the nature of interpleader should be made which will be enforceable in the courts. After careful consideration, I conclude that such order is unnecessary.

It is doubtless true that an interested party in the subject matter of a dispute cannot be bound by a determination in a proceeding to which he is not a party. But that does not preclude an arbitrator from proceeding with bilateral arbitration of an issue which is clearly arbitrable under an agreement of the parties to the dispute. *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 55 LRRM 2042 (1964). In this case, the Company does not contest the arbitrability of the issue and neither it nor the Union questions the arbitrator's authority to hear and determine this case on a bilateral basis. There therefore seems no need for concern over the Boilermakers Union's non-participation, especially since it has been invited to join in this proceeding and has refused.

II.

The substantive issue is both novel and difficult. Most often, in arbitrations arising from plant removal or relocation the issue is whether a prohibition against removal or relocation of a plant or operation is contained in the Agreement and whether the

Agreement has been violated. Article II, Section 1 of the OCAW Agreement however does not prohibit a relocation of the Whiting Plant or operation within the Calumet area. Rather, it permits it—but upon the condition that the Agreement shall *also* apply to such other location. The gravamen of the Union protest therefore is not that the Whiting finishing operation was relocated in violation of agreement but that it was relocated without applying the OCAW Agreement at the new location.

A fair reading of Article II, Section 1, in the light of its negotiating history, leaves no doubt as to its purpose. As the evidence shows, the Union's grave concern with the possible relocation of the Whiting Plant goes back to 1959, when it was told the Company might lose its lease and would have to move to another location in the Calumet area. The Union responded by demanding a provision in the 1959 Agreement, to which the Company agreed, stating that if the Whiting Plant "is moved to another location in the Calumet area, this Agreement shall also apply to such other location." In 1961, when it was faced with a threat of having part of the Whiting operation moved, the Union requested, and the Company agreed to, an amendment of Article II, Section 1 stating that if the Whiting Plant "or operation is moved to another location in the Calumet area, this Agreement shall also apply to such other location."

Although the Union was equally concerned with a possible move of the Whiting Plant *outside* the Calumet area that possibility was dealt with differently. In 1965, when the Union was informed there was a possibility of a new integrated car manufacturing plant being built *outside* the Calumet area, a Memorandum of Agreement was entered into which provided for Company notice, negotiations, and the right of either party to strike or lockout in support of its position concerning the benefits and rights of terminated Whiting employees. Then, in 1967, the Company and Union each proposed changes in the language of Article II, Section 1. The Company's proposal was that Section should provide (1) if the Whiting plant is moved in its entirety

to another location in the Calumet area, the Agreement shall apply to such other location; (2) if any operation or phase of an operation at the Whiting Plant is moved out to another location in the Calumet area at which the Company may lawfully recognize the Union as the exclusive collective bargaining agent, the Agreement shall apply at such other location; (3) if any operation or phase of an operation at the Whiting Plant is moved to another location, whether in or outside the Calumet area, at which the Company may not lawfully recognize the Union as the exclusive bargaining agent, and if such transfer results in permanent termination of Whiting employees, certain procedures involving notice, negotiation, and the right to strike will apply. The Union rejected the Company proposal and it was not adopted. Likewise, the Company rejected the Union's proposed change. The Union wanted the phrase "or any phase of operation" included after "operation" so that the provision would read if the Whiting plant "or operation or any phase of operation is moved to another location in the Calumet area, the Agreement shall also apply to such location."

In the 1969 negotiations, the Union again proposed changing Article II, Section 1 so as to provide that if the Whiting Plant or operation "or any part of an operation" is moved to another location in the Calumet area, the Agreement shall also apply to such location. The Company rejected the proposal and the 1969 Agreement, as finally negotiated, carries over the same language in Article II, Section 1 as contained in the 1963, 1965, and 1967 Agreements.

The provision in Article II, Section 1 that the Agreement shall also apply at another location within the Calumet area to which the "plant or operation is moved" is obviously a condensed expression leaving a great deal to implication and therefore uncertainty and dispute. Surely, the phrase "plant or operation", divorced from context, is susceptible of a variety of meanings. The appropriate meaning can be determined only by placing it in the context of the situation to which Article II, Section 1 was addressed.

The parties' preoccupation during all of their negotiations
a possible relocation of the Whiting Plant or operation
presses me that Article II, Section 1 was purposed to pres
and safeguard the Union's bargaining rights, work jurisdict
and the employees' benefits and rights under the Whiting Ag
ment in the event the plant or the operation performed t
was moved to another location in the Calumet area. Indeed
one has even hinted at any other purpose. To be sure,
Whiting Plant has not been moved. But the entire finis
operation was moved from there. The Plant was then conve
into a tank car repair shop. The question which thus rema
and which requires first consideration, is whether the finis
work performed at the Whiting Plant may properly be
sidered an "operation", within the contemplation of Article
Section 1.

The Company does not dispute that the finishing of t
cars was transferred from the Whiting Plant to Plant No
But it maintains that inasmuch as another activity of the Whi
Plant—repair and maintenance of tank cars—has remai
there, the Whiting "operation" has not been moved and Art
II, Section 1 is not applicable. This is so, the Company conte
because "operation" is used in the singular in the proviso, wh
means that it was intended as a synonym for "plant", ther
excluding a *portion* of the plant. Furthermore, it mainta
even if the proviso is read as applying to the movement
portion of the work done at Whiting, it cannot be considere
a move within the contemplation of Article II, Section 1 beca
the relocated finishing work "was completely integrated with
manufacture of the shells in a unique production line arra
ment, using much new, completely different machinery
many different employees."

Both Company arguments must be rejected. There is
evidentiary support whatever for the notion that "operati
was used as a synonym for the word "plant". The two words
surely not equivalents. Nor does the use of the word "or" m

them such. The most natural meaning of the word "or", when used as a connective, is that it marks an alternative. Neither is there evidence of positive intention that Article II, Section 1 was to be applicable only in case the entire Whiting operation was moved and not merely a portion of it. In the first place, the assertion that only one of two activities at the Whiting Plant was moved is somewhat misleading. In fact, there had been no substantial car repair activity at Whiting for a long time. According to the evidence, only 6 or 7 out of about 200 employees at Whiting worked on car repair in 1969. The rest performed the finishing operation. The finishing of tank cars, which was performed exclusively in the Company's Whiting Plant, was admittedly that plant's principal activity.

Nor am I persuaded that the Union's efforts in 1967 and 1969 to amend Article II, Section 1 makes its interpretation of the unchanged language impermissible. As a matter of fact, the Company also made an unsuccessful effort in 1967 to change the language of Article II, Section 1. It proposed to make it explicit that the Company would not be obliged to apply the OCAW Agreement "if any operation or phase of an operation at the Whiting Plant is moved to a location at which the Company may not lawfully recognize the Union as exclusive bargaining agent"—an intent which it imputes to the present language. Undoubtedly, both parties recognized that the language they had agreed upon was susceptible of more than one meaning and they sought to clarify it. The Company's seeming contention that a party who attempts to clarify by amendment what may be ambiguous agreement language does so at his peril, is not valid, in my opinion.

I also find unmeritorious the Company contention that the transfer of the finishing work to Plant No. 1 where the fabricating work was integrated in a production line arrangement, was not the kind of move contemplated by Article II, Section 1. There are cases, to be sure, where transferred work has been commingled and become inextricably wound up with other work

so that it could no longer be identified (CF & I Steel Corp. Steel Arbitration Awards 11,665 (Platt); Safeway Stores I 42 LA 353 (Ross) but this is not such a case. Here, the fin ing work is plainly identifiable; it is performed exactly as it at Whiting; and it is performed largely in areas separate fr where thte manufacturing operations are performed and un separate supervision.

In sum, I conclude that the phrase "if such plant or ope tion is moved" comprehends a removal of the Plant from W ing to another location in the Calumet area or relocation its principal operation or activity, *i.e.*, the finishing work another place within the Calumet area. The Company's ass tion that only the Graver Plant or operation was moved that what happened at Whiting was merely that instead terminating some employees all Whiting employees were offe preferential hiring at Plant No. 1, is specious. Under the dence in this case, there is no question but that the only pl in the Calumet area where the tank car finishing operation performed was at the Whiting Plant and that operation, in entirety, was moved to Plant No. 1. In my opinion, that the kind of move that was in the parties' contemplation wh they adopted Article II, Section 1 of the Agreement and, wh made, the Company became obligated to apply the OCA Agreement to the relocated finishing operation.

III.

Another crucial and troublesome question is present he The Company maintains that even if Article II, Section 1 d require the application of the OCAW Agreement to the e ployees or to a portion of the employees and operations Plant No. 1 such application would require it to commit unfair labor practice, in violation of Section 8(a)(2) of National Labor Relations Act[1] and any award which wo

1. Section 8(a)(2) makes it an unfair labor practice for employer "to dominate or interfere with the formation or adminis

compel it to do that would be unlawful and unenforceable. The Company's argument runs thusly: under the NLRA and Article II, Section 2 of the Agreement, OCAW's recognition as bargaining representative is limited to the Whiting Plant and, absent a change in its certification by NLRB order or by agreement, the Company cannot lawfully recognize OCAW and apply the OCAW Agreement to any of the employees and operations in Plant No. 1; under NLRB decisions an Employer and Union cannot, by agreeing to extend the application of their Agreement in the event an operation is moved, deprive the employees at the new or relocated operation of their right to choose their own bargaining representatives nor usurp the Board's function of determining the appropriate unit; a separate bargaining unit for the finishing work which has been moved to and is performed in Plant No. 1 would be inappropriate and "in direct contradiction with Labor Board rulings"; to apply the OCAW Agreement to Plant No. 1 would interfere with the Boilermakers Union's certification and it and its members' statutory and contractual rights.

The legal issues raised by the Company are a consequence of its own voluntary extension of recognition to the Boilermakers Union before Plant No. 1 was completed and before any substantial operations were performed there. The Company very likely would not contend, despite its claim that OCAW's certification is limited to the Whiting Plant, that if it moved the plant or operation to a location in the Calumet area where no other Union had recognition rights that it would not be obligated under Article II, Section 1 to apply the OCAW Agreement at the new location. Apparently, when the Boilermaker Union's recognition was extended by the Company to Plant No. 1 there was no thought in anyone's mind that the Whiting finishing operation would be relocated there. Nor is there anything in the Boilermakers Agreement or its negotiating history that even remotely hints at the possibility of a trans-

tion of any organization or contribute financial or other support to it."

fer of the Whiting operation to Plant No. 1. The Agreement only speaks of a possible transfer of a "substantial portion of the work presently performed" at the Graver Plant and provides for separating the Graver Division and Plant No. 1 Agreements on completion of the transfer. In these circumstances, it can hardly be claimed or reasonably inferred that the parties intended the extension of the Union's recognition to Plant No. 1 to also cover the Whiting Plant operation and the OCAW-represented employees there. It is much more realistic to suppose that both the Company and the Boilermaker negotiators understood the extension of recognition to cover only the fabricating work that was "presently" being performed at the Graver Plant and not the finishing operation which was being performed at Whiting.

Nevertheless, the Company argues with force that "irrespective of what Article II, Section 1 might require or what this Arbitrator might construe it as requiring" it would be "unlawful", under NLRB decisions, to apply the OCAW Agreement to Plant No. 1 or any portion of it. And, it reminds the Arbitrator that he should not issue an award requiring conduct forbidden by law even though sanctioned by the Agreement. In other words, what the Company is asking the Arbitrator to do is to ignore "what Article II, Section 1 might require" and decide this case solely on NLRB principles and the "law."

The legal questions raised by the Company were not discussed by the Union in its post-hearing brief or at the hearing. Whether that was because it has doubts about the Arbitrator's authority to decide NLRA or other legal questions is not known. Nevertheless, having done a reasonable amount of legal research himself, the Arbitrator can report with confidence only that the questions posed are complex and the available answers inconclusive.

There is a variety of opinion among arbitrators and legal commentators[2] concerning the authority and responsibility of

2. See: Meltzer, Rumination About Ideology, Law, and Labor Arbitration, in THE ARBITRATOR, THE NLRB, AND THE COURTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL

an arbitrator to decide claims of invalidity of awards warranted by the Agreement but, arguably, in conflict with an applicable statute or law. Specifically, the question for the Arbitrator is whether, in this case, his responsibility extends to deciding the legal issues raised.

After careful and most anxious consideration, I have concluded that my primary responsibility as Arbitrator is to interpret the parties' Agreement and not "to look beyond its borders for some external standard by which to nullify or restrict its operation."[3] In *United Steel Workers* v. *Enterprise Wheel & Car Corporation*, 363 U. S. 593, 597, 46 LRRM 2423 (1960) the Supreme Court stressed that an arbitrator in interpreting a collective bargaining agreement "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement". And, it added, an award based "solely upon the arbitrator's view of the requirement of enacted legislation . . ." would exceed the scope of the submission. The temptation, particularly for a lawyer-abritrator, to deal with legal questions, though very great, must nevertheless in this instance be resisted. Especially where, as here, the Arbitrator is asked to apply NLRB principles to issues that arguably involve representation and appropriate bargaining unit questions where the law is complex, uncertain, and in flux. In fact, for the past several years, the NLRB and many of the federal circuit courts have been in disagreement regarding questions of the composition of an appropriate bargaining unit.

ACADEMY OF ARBITRATORS 1 (1967); Howlett, The Arbitrator, the NLRB, and the Courts, in PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67 (1967); Mittenthal, The Role of Law in Arbitration and Meltzer, Howlett, and St. Antoine, Discussants, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42, 58, 64, 75 (1968).

3. St. Antoine, *supra* note 2.

> This has previously been most apparent in cases involving retail store chains. See, ABA Labor Relations Law, pp. 49-50 (1968). During 1969, the dispute in the retail store chain area continued and even extended into the industrial area without any indication that the Board is willing to defer to the contrary views on bargaining units held by several circuits.[4]

The above circumstances alone would pose a dilemma for the Arbitrator if he undertook to decide whether the application of the OCAW Agreement to the relocated finishing operation "would result in a bargaining unit which clearly would be inappropriate," as the Company urges. Inevitably, a question would arise as to what "law" he should apply. Would it be a majority decision of the NLRB? Would it be a Board decision made before a change in administration or before a change in the membership or Chairman of the Board? Or would it be a decision of a Circuit Court of Appeals which is in disagreement with the Board applied standards?

I believe, as I have had occasion to say elsewhere:[5]

> Whatever might be said in favor of harmonizing the law and the contract, when possible, arbitrators should move cautiously and should be loathe to make statutory and legal interpretations, certainly in the absence of clear legal precedent.

Accordingly, in this case, I must decline to decide the legal questions raised. It need hardly be added that in doing so, those questions (but not the contract interpretation questions) are left for resolution, in the parties' discretion, in a forum which has responsibility for dealing with such specialized matters.[6]

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4. ABA, Labor Relations Law, pp. 39-41 (1970).

5. Platt, The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964, 3 Ga. L. R. 398, 403 (1969).

6. For a further explication of this view, See, Wollett, The Agreement and the NLRA: Courts, Arbitrators and the NLRB—Who Decides What? 14 Labor L. J. 1041 (1963) where he states:

> Clearly there is potential conflict here—"potential conflict of rules . . . , of remedy and of administration"—between the

IV.

Having decided the question of the meaning and application of Article II, Section 1 of the OCAW Agreement in the specific context of this case and having determined that, as here construed, Article II, Section 1 requires the application of the OCAW Agreement to the finishing operation in Plant No. 1, there remains the question of an appropriate remedy for the Company's failure to apply the Agreement.

Of course an arbitrator has authority, in the absence of a provision prohibiting, to fashion and award an appropriate remedy upon finding an agreement violation. In the Union's view, the following relief is appropriate and should be granted:

1. Recognition and application of the OCAW contract for any finishing operation performed at Plant No. 1, including the attendant indirect labor involved in that operation.

   In the alternative, the Union is seeking the re-establishment of the Whiting operation on a scale and size

---

award of the arbitrator and the decision of the Board. Suppose, for instance, that the arbitrator holds against the employer on the contract question and directs him to take action which the NLRB would hold to be an unfair labor practice?

The importance of reducing areas of uncertainty and dispute in the formation of contracts impels the conclusion that the validity of the provisions the parties agree to should be the exclusive business of the forum upon which they have their eye when they write the language of agreement. In this instance that forum is the NLRB . . .

But suppose unfair labor practice charges are not filed? . . . should the arbitrator, if he sustains the union on the contract question, pass on the unfair labor practice question?

I would argue that he should not. I would suggest further that his award should not be vulnerable to vacation in judicial proceedings on the ground that it directs the commission of an unfair labor practice. This is a question for the NLRB, and the employer should be required to make his argument there.

The same considerations impel the same conclusion in other situations where the complainant grounds its claim in contract and the respondent contends that the contract (or the provision at issue) is illegal on its face.

commensurate with the Employer's finishing operation at Plant No. 1.

2. Recall and reinstatement of all employees, including quits, layoffs, retirees, who lost employment as a result of the transfer of the operation and the recognition of the Boilermakers for that operation at the new plant.
3. Reimbursement to all OCAW represented employees of any lost wages and benefits, including health and welfare and retirement benefits caused by the violation of contract, the recognition of the Boilermakers, and the application of the Boilermarkers' contract.
4. The reimbursement to the OCAW of all lost dues and initiation fees.
5. Any other and further relief as may be appropriate to make the Union and its employees whole under the circumstances.

The requested specific relief is of a wide-ranging nature. Whether some or all of it may appropriately be granted is a question that cannot be decided on the present state of the record. Remedial problems in cases of this kind are knotty and complex. Yet neither at the hearing nor in the briefs has the subject been fully explored. In the circumstances, it would be imprudent for the Arbitrator to attempt to devise a remedy in this case at this time. I will therefore remand this phase of the dispute to the parties for negotiation and settlement, failing which within a reasonable period, either of them may resubmit the question for determination by the Arbitrator. On such re-submission, a hearing may be scheduled for presentation of proofs and argument limited, of course, to the question of an appropriate remedy.

AWARD

On the evidence in this case it is determined:

1. The Union grievance was not untimely filed and it is arbitrable.

2. An order of interpleader to require the joinder of the Boilermakers Union is unnecessary.

3. Article II, Section 1 of the OCAW Agreement, reasonably construed, requires application of the Agreement to the finishing operation which was moved from the Whiting Plant to Plant No. 1.

4. The Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1.

5. The question of the nature and extent of relief to be granted in this case is remanded to the parties for negotiation and settlement, failing which, within a reasonable period from the date hereof, either party may resubmit that question for the Arbitrator's determination.

6. The Arbitrator reserves jurisdiction to finally decide the remedy question, with or without a further hearing, if and when it is resubmitted to him.

/s/ HARRY H. PLATT,
Harry H. Platt, *Arbitrator*

August 4, 1970.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-144

LOCAL 7-210, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

vs.

UNION TANK CAR COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent, Union Tank Car Company, hereby files its brief in opposition to granting the writ of certiorari in the above-captioned matter.

QUESTION PRESENTED.

Whether the Courts below erred in refusing to enforce an arbitrator's award which conflicts with a final decision of the National Labor Relations Board.

COUNTERSTATEMENT OF THE CASE.

At the outset, it should be noted what this case does not involve. There is no claim that this case is a departure from a decision of this Court; on the contrary, it is claimed that the error of the lower Courts' decisions is that those Courts directly followed decisions of this Court. Nor is it claimed that there is a conflict among the Circuits. Indeed, the decisions below are in accord with every case which has decided the issues raised here. Such unanimity of case law also underscores that this case raises no issue not already well settled under national labor policy.

This is a Section 301 action, 29 U. S. C. § 185, which has followed a litigious path to this Court. In brief, Union Tank Car Company (hereinafter referred to as the "Company") has maintained for many years two tank car facilities in Indiana. The first, East Chicago, was principally engaged in the fabrication of tank car shells and was covered by successive collective bargaining agreements with Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the "Boilermakers"). The second, Whiting, was engaged in the finishing of tank cars fabricated at and shipped from East Chicago and the repair and maintenance of tank cars. The Whiting plant was covered by successive collective bargaining agreements with Local 7-210, Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter referred to as "OCAW").

In 1966, the Company acquired a vacant facility in East Chicago, known as Plant No. 1, directly across the street from its facility represented by the Boilermakers, where it built, for the first time in the industry, an integrated tank car manufacturing facility, where new tank cars could be built completely in one place. By June 1969, the Company had transferred employees represented by the Boilermakers to Plant No. 1, such that the plant was fully operational and was turning out com-

etely finished tank cars. At that time, it is undisputed that ıe Company's plans were to retain the Whiting facility for both nishing and repair and maintenance. In late 1969, however, ecause of serious economic conditions, the Company concluded ıat it could no longer operate dual facilities and told OCAW f its intentions to curtail finishing operations at Whiting.)CAW took the position that under its agreement, the Com- ıny was required to apply the OCAW contract to the finishing perations at Plant No. 1, a position the Company disputed both nder the OCAW contract and in light of the fact that it could ot lawfully recognize OCAW or apply the OCAW agreement t Plant No. 1 since the Boilermakers were the exclusive bar- aining representative there.

OCAW grieved, and arbitration ensued before Arbitrator Harry Platt who held not, as stated in OCAW's Petition, that he transfer of finishing operations to the new plant was pre- onditioned on applying the OCAW contract there, but rather hat the Company had violated the OCAW contract merely by ts failure to apply the OCAW contract to the finishing opera- ions at Plant No. 1.[1] Subsequently, the arbitrator issued a final ıward, ordering application of the OCAW contract to the finish- ng operations performed at Plant No. 1 and the payment of lamages during the period in which the OCAW contract was ıot so applied.[2]

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1. Thus the Arbitrator held (A. 77):

> "The Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1."

This narrow holding was reiterated by the Arbitrator in his subsequent award (A. 45):

> "The prior award in this case determined that the Company violated Article II, Section 1 of the Agreement by failing to apply the OCAW Agreement to the finishing operation when it was moved from the Whiting Plant to Plant No. 1."

2. The precise award of the Arbitrator was (A. 48):

> "(a) Contingent upon a determination by the National Labor Relations Board that it would not violate the provisions

The Platt award opened up a legal Pandora's Box. The Boilermakers filed unfair labor practice charges against the Company for dealing with OCAW vis-a-vis the finishing operations at Plant No. 1, a facility which they, not OCAW, exclusively represented. This resulted in the issuance of a complaint by the National Labor Relations Board against the Company. During the same period, OCAW filed a series of representation and unit clarification petitions with the Board, which were subsequently withdrawn. In addition, the Boilermakers filed charges under the AFL-CIO Internal Disputes Plan which resulted in an award by Arbitrator David Cole finding OCAW in violation of the AFL-CIO Constitution. The NLRB unfair labor practice litigation was eventually ended in late February 1971, with an agreement by all parties, including OCAW, that the litigation created by the Platt award would be decided through the Board's representation processes, rather than through unfair labor practice hearings.

Thereafter, the Company filed a unit clarification petition which resulted in a ruling that the "appropriate unit of Plant No. 1 is a plantwide production and maintenance unit, including the finishing operations and that the employees in this unit are presently and have been since June 1969, represented by the Boilermakers as their exclusive bargaining representative." (A. 41.) Thus, the Board ruled that the Boilermakers had been representing the employees doing finishing work at Plant No. 1 since June 1969, a full year before Arbitrator Platt's decision and six months before OCAW's grievance was even filed.

Subsequently, OCAW brought suit in Federal District Court under Section 301 seeking enforcement of the damage portion

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of the NLRA, the Company is directed to apply the existing OCAW Agreement to the finishing operations performed in Plant No. 1.

"(b) The Company is directed to reimburse and make whole all OCAW-represented employees for all lost wages and benefits, including health and welfare and retirement benefits, caused by the violation of Article II, Section 1 as heretofore determined."

the Platt award. The District Court, after a thorough review the applicable case law, dismissed the complaint and granted dgment for the Company, holding (A. 27):

> "In view of these decisions, it would appear that the law thus established is that where there is a conflict between an arbiter's award and a later NLRB ruling, the arbiter's findings must give way before the superiority of the NLRB decision. If the employer has acted in accord with the NLRB decision, it is not liable for damages."

This decision was affirmed by the Court of Appeals for the eventh Circuit which ruled that since the Boilermakers had all times been the exclusive representative for all employees Plant No. 1, including those performing finishing work, the bitrator's award requiring application of OCAW's contract ere and the payment of damages for not applying that contract as unenforceable. Finding the arbitration award in direct nflict with the NLRB's unit clarification decision, the Court fused to enforce any portion of the arbitration award, holding A. 7):

> "The Company did not apply the OCAW contract to Plant No. 1 because it could not legally do so, for such would have been an unfair labor practice. Having acted in accord with the NLRB decision, how may the Company be liable for damages for refusing to violate the law?"

In refusing to enforce the arbitrator's award, the Court relied n a series of decisions of this Court, primarily *Carey* v. *Vestinghouse Electric Corp.*, 375 U. S. 261 (1964), its own ecisions, primarily *Smith Steel Workers* v. *A. O. Smith Corp.*, 20 F. 2d 1 (7th Cir. 1969), and other court decisions unani- nously agreeing that NLRB decisions take precedence over rbitration awards. The Court thus concluded (A. 11):

> "A complete reading of *Smith*, and its recognition of *Carey* and related cases, makes clear to us the relevance of the supremacy doctrine, and that once the Board has acted, either before or after the arbitrator's award, the Board's order overrides the arbitrator's decision. *Smith*

> further makes it clear that contractual rights cannot exist separately and apart from the union's right to represent the unit."

Rehearing *en banc* was denied by the Seventh Circuit and this Petition for Certiorari was filed.

ARGUMENT AGAINST GRANTING THE WRIT.

Both the Seventh Circuit and the District Court Properly Held That an Arbitrator's Award Which Conflicts with a Decision of the NLRB Cannot Be Enforced.

This Court has long held that decisions of the National Labor Relations Board are supreme over arbitration decisions and that contractual provisions in collective bargaining agreements which conflict with NLRB decisions are unenforceable. This point was well made by this Court in *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 365 (1940):

> "It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it."

Similarly, this Court has held that although resort to arbitration may be favored under national labor policy, this policy must be accommodated with, and may be subjugated to, other competing interests. Thus, in both *NLRB* v. *Plasterer's Local Union No. 79*, 404 U. S. 116 (1971), and *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U. S. 351 (1971), this Court ruled that forums other than arbitration—the Federal Courts in *Arguelles* and the NLRB in the *Plasterers'* case—were to resolve the underlying disputes despite the availability of arbitration in both instances.

Both these policies—NLRB supremacy and the subordinate role of arbitration in certain circumstances—coalesced in this

ourt's decision in *Carey* v. *Westinghouse Electric Corp.*, 375 . S. 261 (1964). The Court in *Carey* held that the dispute ere was difficult to classify. Thus, it could be considered either representational dispute—and be resolved by the NLRB rough a unit clarification petition, as it was resolved in this se, or unfair labor practice charges under § 8(a)(5)—or a risdictional dispute—and be resolved by the Board under a 10(k) proceeding with the filing of a § 8(b)(4)(D) charge. n either case, this Court declared, arbitration could have "a ervasive, curative effect," on the dispute, 375 U. S. at 272, and rdered Westinghouse to arbitrate the controversy.

The Court cautioned, however, that the decision of the arbi-ator was not necessarily to be the final word on the contro-ersy. Quite the contrary, for, as this Court noted, such dis-utes were entirely within the province of the NLRB which could nally decide the matter. Thus, the Court held, 375 U. S. t 272:

> "*. . . Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would of course, take precedence; and if the employer's action has been in accord with that ruling, it would not be liable for damages under § 301.*
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> * * * * * *
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> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent and those conciliatory measures which Congress deemed vital to 'industrial peace;' (Textile Workers v. Lincoln Mills, supra, 353 U. S. at 455, 77 S. Ct. 917) and which may be dispositive of the entire dispute, are encouraged. *The superior authority of the Board may be invoked at any time.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." (Emphasis added.)

And, as if this did not plainly establish that representation ights as determined by the Board are controlling over the

parties' contract and insulate an employer from any damages flowing from such a contractual breach, as here, the Court reiterated this in a previous passage. Holding that the mere existence of a Board remedy is insufficient to bar a suit "seeking damages for breach of a collective bargaining agreement," the Court went on to say, however, that once "invoked by the employer [the Board remedy] will protect him." 375 U. S. at 268.

Since, as noted above, this Court reiterated in several passages in *Carey* that the Board decision is superior to that of the arbitrator's and that an employer's action in accord with the Board decision would immunize him from damages, Petitioner's claim that the decision in *Carey* on the damage issue was, if not ill-considered, unconsidered—referring to the *Carey* decision on this issue as "inadvertently stated" and "unnecessary dictum"—is hardly supportable. Indeed, the decision on the damage issue emphasizes precisely what "the superior authority of the Board" encompasses.

Petitioner states that the *Carey* decision has led to "a small but developing body of labor law that seems to stand for the proposition that no arbitration award can remedy an employer's violation of its contractual obligations." On the contrary, the body of case law supporting the Seventh Circuit's decision in this case is hardly small, and these cases stand for the proposition, as stated by this Court in both *National Licorice* and *Carey*, that NLRB decisions and the law under the Labor Management Relations Act (LMRA) supersede the parties' collective bargaining agreement.

Significantly, the fact that the Petitioner cannot cite one single court case in which damages have been allowed in a parallel context underscores quite well both the well settled state of the law and the fact that the position the Petitioner articulates has been consistently rejected. In fact, every court which has grappled with the issues raised by this case has either refused to allow arbitration to go forward and hence foreclosed the question of

amages or other remedial relief *ab initio, see, e.g., Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir. 1969); *IAM Howmet Corp.*, 466 F. 2d 1249 (9th Cir. 1972); *McGuire* v. *Humble Oil & Refining Co.*, 355 F. 2d 352 (2d Cir.), *cert. denied*, 384 U. S. 988 (1966); *Teamsters* v. *Ace Enterprises, Inc.*, 332 F. Supp. 36 (S. D. Cal. 1971); or has refused to enforce the arbitrator's award of damages or other relief, *see, e.g., New Orleans Typographical Union* v. *NLRB*, 368 F. 2d 755 (5th Cir. 1966); *Dock Loaders* v. *W. L. Richeson & Sons*, 280 F. Supp. 402 (E. D. La. 1968);[3] *Ironworkers* v. *Lake County Council*, 347 F. Supp. 1377 (N. D. Ind. 1972); *Local 1547, IBEW* v. *Local 959, Teamsters*, ... F. Supp. ...., 83 LRRM 2785 (D. Alaska 1973).

Two final points should be made. First, although the arbitrator divided his award into two parts, one requiring application of the OCAW contract to Plant No. 1 and the other requiring the payment of damages based upon the failure to so apply OCAW's contract, the two portions of the award, as held by the Seventh Circuit, were inseparable. This is so because, as stated by the Seventh Circuit, in accord with its decisions in *Retail Clerks* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963) and in *Smith Steel Workers, supra*, the Board's unit clarification decision defined the lawful limits of the OCAW contract. In this case, the lawful limit of OCAW's contract, was, according to the Board (the final authority in this matter), the Whiting plant, and the Company could not lawfully apply, even though ordered by the arbitrator, the OCAW contract to Plant No. 1, a facility exclusively represented by the Boilermakers.[4] Since that contract could never lawfully be applied at Plant No. 1, a fact which even

3. Petitioner misstates the facts of *Richeson*. In that case, arbitration went forward and the District Court held that damages would not be allowed because the arbitrator's decision conflicted with the NLRB's work jurisdiction award.

4. Thus, as this Court held in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44-45 (1937), "the obligation to treat with the true representative [is] exclusive and hence impose[s] the negative duty to treat with no others."

the Petitioner concedes, the Company cannot be required to pay damages for either not applying it or refusing to violate the law.

Second, the Petitioner claims that the Company unilaterally and voluntarily breached the contract, characterizations we emphatically deny. But, even assuming *arguendo* their applicability here, such phrases, however, carry no talismanic quality, for they are applicable to a number of cases decided by other Circuits which reached conclusions similar to that reached by the Seventh Circuit here.

Thus, in *New Orleans Typographical Union, supra,* the employer voluntarily installed a new piece of equipment which took work away from the Typographers. An arbitrator found that the work was covered by the Typographers' contract, and not the Lithographers', and that the assignment of this work to the latter union encroached on the former's work jurisdiction. The Board held that irrespective of the arbitrator's decision, the work belonged to the Lithographers. The Fifth Circuit denied enforcement of the arbitrator's award and ruled that the NLRB determination took precedence. Thus, even though the employer voluntarily introduced this piece of equipment which deprived one union of work which belonged to it under its contract, the Board's ruling negated any enforcement of the arbitrator's award.

Again, in *IAM* v. *Howmet Corp., supra,* an employer voluntarily shut down a plant represented by the Machinists and laid off the employees there. The Machinists claimed that its contract was to apply to any laid off employees hired at other plants, even though such other plants were represented by other unions. This is precisely the claim made by the Petitioner here. The Ninth Circuit refused to order arbitration of this contractual dispute, since any such employees were now exclusively represented by other unions.

Indeed, this Court's decision in *Carey* presupposes that such a voluntary contractual breach will be made by the employer, but grants protection from liability if the employer's decision is in accord with a later NLRB decision. Thus, this Court in *Carey*

addressed itself to a situation where an arbitrator would have already decided the contractual issue. As such, any actions the employer would take subsequently, contrary to the arbitrator's decision, would plainly be "voluntary" for he would have full knowledge that, according to the arbitrator, he had breached or was going to breach the contract. Yet, this Court held clearly that in such a situation, an employer is immune from damages if he follows a later Board decision, rather than the arbitrator's award.

In short, both the Seventh Circuit and the District Court correctly analyzed the arbitrator's award, its conflict with the NLRB decision and the implications of such a conflict under the LMRA. And, in refusing to enforce the arbitrator's conflicting award, both Courts followed the consistent line of cases in this Court and every single case which has dealt with this issue.

CONCLUSION.

In light of the fact that the Seventh Circuit's decision is in complete accord with this Court's decision in *Carey* and *National Licorce* and in accord with every single case dealing with the issue presented, it is respectfully submitted that this case raises no issues not already well settled under national labor policy and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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